The Central Law Journal.

SAINT LOUIS, NOVEMBER 30, 1877,

CURRENT TOPICS.

WE HOLD over until our next issue the decision of the Supreme Court of the United States in Cass County v. Johnson, for the purpose of publishing with it a complete statement of the facts of the case, which the opinion of Mr. Chief Justice Waite does not contain. Without an understanding of the particular circumstances the decision is liable to be misunderstood; and we, therefore, in justice to the court prefer not to publish the opinion until we can obtain this. Since our last issue we have also received the dissenting opinion of Mr. Justice Bradley—the learned judge who delivered the opinion in Harshman v. Bates County—which is concurred in by Mr. Justice Miller. The case, when reported by us, will be complete in every particular, and we feel assured that our subscribers in this state who are interested in the decision, will much prefer a comprehensive and correct report of the case, though they may have to wait a week, to a statement of it which might be incomprehensible and misleading.

WHAT moral shall be drawn from the fact that we have in Missouri a judge who does not know better than to hold private communications with a jury who have their verdict under consideration in a criminal case, or who is so ignorant as to recall a jury and give them additional instructions in a civil case after all other persons, including the parties and their counsel, have left the court-room? Shall we make it a text for a sermon on the beauties of the caucus system of making judges? Two cases—*State v. Alexander* and *Norton v. Dorsey*—in which these extraordinary proceedings took place, are given in our Missouri abstracts this week. Our brief synopses do not give the name of the judge who committed the blunder. We assume, however, that both cases went up from one judge; for, although we have some sorry lawyers in Missouri as well as elsewhere, we do not believe that *two* could be found in the state who would not know better.

DR. VON BAR, Professor of International Law at the University of Breslau, in a recent number of the *Revue de Droit International*, discusses the Winslow Extradition case with much learning and ability, He concludes that all such international transactions should be governed by the following principles: 1. The person extradited ought not to be prosecuted for any offense committed prior to the extradition without the express consent of the extraditing government. 2. This consent ought not to be refused, except when the offense is against the Revenue Laws, or is of a political or trivial character, the extraditing government being sole judge. Consent ought to be given without reference to the punishment which may follow conviction, and whether the offense is or is not within the category of those for which, by treaty, extradition may be demanded. 3. The party seized for extradition may plead the absence of consent, and if, after a reasonable delay to be fixed and granted by the court within which to obtain it, the requisite consent is not produced, the prisoner is to be discharged. The courts are not to concern themselves about the question whether the consent be properly or improperly granted or withheld. If the person extradited voluntarily remains after conviction or discharge any considerable time within the jurisdiction of the prosecuting government, consent of the extraditing government is no longer requisite.

THE *Solicitor's Journal* (London, Henry Villers, 52 Carey street, W. C.,) has just entered upon its twenty-second volume; and its twin publication, the *Weekly Reporter*, has just commenced its twenty-sixth volume. During the past three years we have had the advantage of an exchange with this dual publication, and it has been of great and constant value to us. It is edited in a manner which evinces a thorough training, and the very best judgment. Its case-reporting covers a wide range, embracing all the divisions of the high court of justice; the court of appeal and the house of lords, as well as the decisions of the railway commissions, and, in special cases, decisions of the county courts, whose judges are eminent serjeants or barristers. An illustration of the advantage to an American practitioner of a weekly report of the most valuable English case-law, will be found in the following instance, which we cite out of several others: A case involving some $40,000 has been recently won by a member of the St. Louis bar in one of our courts, upon the authority of the *New Sombrero Phosphate Co.* v. *Erlanger*, and other English cases relating to the liability of the promoters of corporations. The report of this case was furnished him by us, from our files of the *Weekly Reporter*. We can not well see how an American lawyer in full practice can consider his library equipped, unless he takes one of the three English law journals; and, from a considerable acquaintance with all of them, we unhesitatingly say that we consider the *Solicitor's Journal* and *Weekly Reporter* the most useful of the three to the American lawyer. As this looks something like a "puff," we may add that it is spontaneous; we have had no correspondence with either the editor or publisher of the journal named for three years.

A COURT of Equity has no power to enjoin a person from opening a window in his wall which will overlook another's land and destroy his privacy. The only remedy is for the person suffering the annoyance to close the window by building up against it on his own ground. A recent case in Pennsylvania, Shell v. Kemmerer, 34 Leg. Int. 410, contains a full review of the

authorities on this subject. Pearson, J., in his opinion says: "That there is no remedy in England except that given to the owner of the property whose ground is overlooked, by raising up a barricade to darken or close the window, is declared by Le Blanc, J., in Chandler v. Thompson, 3 Camp. 80, who says Eyre, C. J., had said no such action would lie, and the only remedy was to build on the adjoining land opposite the offending window. This is reiterated by Bayley, J., in Cross v. Lewis, 2 B. & C., p. 686, and in the same case by Holroyd, J. The author of Bacon's Abridgement adopts the doctrine as sound: 1 Wilson's Bacon. p. 49, title, Actions in General. The same is treated as sound by Bouvier's Law Dict., title, 'Windows;' and by Chancellor Kent, 3 Com. 448, 6th edition. What is of more weight, Savage, C. J., in Mahan v. Brown, 13 Wend. 261, cites those cases with approbation, 3 Camp. 80, and B. & C. 686, and declares that although opening windows overlooking another's land is a wrong which will ripen into a right, yet no action will lie. The only remedy is to build against them. But an injunction can be sustained for stopping ancient windows. Cherrington v. Abuey, 2 Vernon, 646. If, therefore, the party whose privacy is invaded has no other remedy to close the window illegally opened and overlooking her ground, than to build against it, and thus close it up, the injunction cannot be sustained. In my own individual judgment a bill in equity is a very proper remedy. The right is there settled by the law of the land and not by the mere act of the party injured, which remedy should always be discouraged; but I must take the law as I find it written. We have no power to change or disregard it. Injunctions to restrain and settle the right would be a much more proper remedy than the party injured deciding for himself."

ALBERT CURRLIN, one of the leaders of the late labor riots at St. Louis, having through the imperfection of the laws or the dereliction of those elected to administer them, escaped all punishment for his crimes, started a weekly newspaper in the interests of the downtrodden workingman, but, as such ventures usually are, it was short lived. He then started another of a more miscellaneous character, but devoting considerable space to scandalous personalities. One of these articles was a gross attack upon a young lady; whereat two young men, employed for that purpose, set upon Mr. Currlin and gave him a sound beating. He instituted proceedings against them in the Court of Criminal Correction, and employed as the prosecuting counsel Hon. James J. McBride, an able criminal lawyer. When Mr. McBride attempted to officiate in court as the prosecuting counsel, with the consent of the prosecuting attorney of the court, the judge of the court refused to allow him to do so, on account, as is alleged, of some disparaging remarks which Mr. McBride had made concerning the judge, on the street. Thereupon Mr. McBride became violent in his language, and the judge fined him ten dollars and committed him to jail for three days. Mr. McBride paid his fine and served out his imprisonment, and then published in a morning paper a card denouncing the judge, in language, which, for vigorous prose, very few writers can equal. This card contains the following extraordinary statement, which we do not for a moment credit, but which if true in the smallest degree, deserves the attention of the bar association far more seriously than any case which has yet been before it:

"I myself know, since he ascended the dizzy height on which he now so proudly stands, that many of the lawyers that practice in this court, in accordance with an expectation which they knew he entertained, and which for the sake of their clients, they were afraid to disappoint, have slipped him many a $5 and $10 note, which he clutched with avidity, but always with caution and in silence. Many of their clients have put their contributions in his charity-box themselves, believing, as they naturally would, that it would have more influence if the heat of their palms accompanied the clink of their gold. Now it is no defense for him to say that others have done the same thing, nor that the taking of illegal fees is right because it is customary."

We have no doubt that this startling statement would, if investigated, be found to refer solely to the taking of certain fees, which the judge—the court being one of inferior jurisdiction—understands himself entitled by law to receive, and that an inquiring into the matter would at least vindicate his integrity.

WHAT would a person of ordinary intelligence think, if he were to pick up a copy of the London *Times*, and find in its editorial columns the following paragraph: "We trust Vice Chancellor Malins will yield to the request of the attorneys representing the city in the gas suit, and will allow the examination of the books and papers which is asked for. There can be no waste or loss attending the examination. It is said that the city desires to compile certain accounts, the loss of which by fire or otherwise, would create much confusion. The gas company ought to offer no objection." We do not believe that a paragraph like this, undertaking, in direct terms, to advise a judge how to decide an issue pending before him, has been published in a respectable English newspaper during the last fifty years. But the above paragraph, word for word, except the name of the judge, appeared in the editorial columns of the St. Louis *Globe-Democrat* on last Sunday morning. It referred to an application made toa judge, for leave to examine certain books of a corporation of which the judge had appointed a receiver, which application the judge had taken under advisement. Such a paragraph, under such circumstances, was in the highest degree disrespectful to the judge whom it was intended to influence, although the editor, doubtless, did not so intend it. But the frequent newspaper advice which judges receive, illustrates, in a profound degree, the disrespect and want of public confidence into which the judicial office has fallen under the elective system. Instead of considering that if the judge were to permit himself to be influenced by his ad-

vice he would be deserving of impeachment, the newspaper writer who penned the above paragraph, or the publisher who ordered its insertion, probably reasoned in this way: "We helped to elect this judge, or our influence secured his nomination in the party caucus; therefore he will prove ungrateful if he do not listen to our advice." On the other hand, the honest judge, to whom the advice is addressed, will probably reason in this way: "Who are you, that offers this advice? You are a newspaper writer, talented, no doubt, in your way, but unknown to me and to the public, and responsible to no one except your publisher, whom you serve at so much a week. You are ignorant of law, and if you were not, what do you know about the merits of this controversy? Or, if this article has been sent up to you from your publisher in the counting-house below, and its insertion ordered, he has doubtless done it because he has received pay for it from some interested party. And if he has done so, it is a roguish thing for him to conceal that fact, and attempt to defraud my judgment by the false pretense of giving disinterested advice. But does he not know that I can only receive advice from parties litigant or their counsel, and that in open court? Or if, under peculiar circumstances, a person assumes to advise me as a friend of the court, that person must be a member of the court's bar, and responsible to the court for his good conduct. I have heard a newspaper outcry about a member of the bar charging a fee for services as *amicus curiæ*, but a newspaper *amicus curiæ* at a dollar a line, is a subject worthy of the common jail."

EFFECT OF FRAUDULENT CONVEYANCES UPON THE RIGHT OF DOWER.

It has been frequently held that a conveyance by husband and wife of real estate, in which the wife has an inchoate right of dower, subsequently set aside as being fraudulent as to creditors, will not operate to bar the wife's dower. The theory of the cases appears to be that a conveyance thus set aside at the suit of creditors for fraud is to be treated as a mere nullity—as though it had never been made—and that the wife's inchoate right of dower is, therefore, wholly unaffected by it; that whilst, the conveyance subsisting, she would be estopped to assert her right of dower as against the fraudulent grantee, yet, the conveyance being annulled, the creditors of her husband can, as against her, derive no advantage from it.[1] Another reason given is that "the right to dower, though consummate on the death of the husband, rests in action only. Before the assignment it cannot be aliened by the widow nor sold on execution against her. She may release it to the owner of the fee, but cannot transfer it to a stranger. It attends the estate, and is only severed from it by assignment."[2] Again it has been said that the wife could not have released dower by herself to the fraudulent grantee. "It cannot exist as a separate right in him or his grantee, dissociated, so to speak, from the interest or estate of the husband."[3]

Looking for applications of this rule, we find that it has been held that if a creditor, during the life of the husband, levies an execution upon land thus fraudulently conveyed with release of dower, and recovers the land in a real action against the fraudulent grantee, on the ground that the conveyance was fraudulent and void as against creditors, the wife is restored to her rights, and, on the death of her husband, may recover dower of such creditor or of his assigns.[4] So, where a husband, by a deed in which his wife joined to release dower, conveyed land to a third person who conveyed it back to the wife, and subsequently both deeds were set aside as being fraudulent as against creditors, it was held the wife's inchoate right of dower was not merged in the fee conveyed to her, so as to prevent her from claiming it after the deed to her was set aside.[5] So, where a husband conveyed to his wife certain land in which she had an inchoate right of dower, and afterwards both husband and wife conveyed it to a third person, and a judgment creditor procured a decree setting aside both conveyances as being fraudulent and void as to him,[6] and ordering the grantees to relinquish all their apparent interest to him, except the dower of the female grantor, it was held that she, after her husband's decease, might maintain an action to recover dower in the premises.[7] So, in setting aside a fraudulent conveyance in which the wife has released dower, at the suit of an assignee in bankruptcy, it is error to vest title in the assignee discharged of the wife's dower. It is said that the assignee "succeeds to all the interests of the bank-

(1) Dugan v. Massey, 6 Bush (Ky.) 81; Lowry v. Fisher, 2 Bush (Ky.) 70; Summers v. Bobb, 13 Ill. 483; Robinson v. Bates, 3 Metcf. (Mass.) 40; Richardson v. Wyman, 62 Maine, 280: Mallory v. Horan, 12 Abbott, P. R. (N. S.) 289; Cox v. Wilder, 2 Dillon, C. C. 45; Morton v. Noble, 4 Chicago Leg. News, 157; Woodworth v. Paige, 5 Ohio St. 70.

(2) Treat, J., in Summers v. Bobb, *supra*.

(3) Cox v. Wilder, 2 Dillon, C. C. 47.

(4) Robinson v. Bates, 3 Metcf. (Mass.) 40.

(5) Mallory v. Horan, 12 Abbott, C. Pr. (N. S.) 289. Compare as to the right of homestead, Castle v. Palmer, 6 Allen, 401; Murphy v. Crouch, 24 Wis. 365.

(6) Wyman v. Fox, 59 Maine, 100.

(7) Richardson v. Wyman, 62 Maine, 381. Appleton. Ch. J. said: "The deed to the demandant releasing to her the fee being avoided for fraud, the tenant would set it up as an existent estate to bar the dower to which she would otherwise be entitled. If no conveyance had been made by Amos Wyman to his wife, her right to dower would have been unquestioned. Reduced to the ultimate elements, the proposition is that a deed fradulent and void as to the tenant, and which has been avoided by him, may, after such avoidance, be set up by him as a valid and existent deed, for the purpose of defeating and destroying a right to which the demandant would unquestionably have been entitled, had no such deed been executed. When a lesser estate is merged in a greater, the greater estate must be assumed as valid and continuing. There can be no merger when the estates are successive and not concurrent, and where the greater estate is void and has been avoided."

rupt, and represents his creditors so far as to enable him to attest conveyances made by the bankrupt in fraud of their rights. He claims that the deed is void as to creditors, and on this ground alone he attacks it; and upon this ground alone has he any right to the property. He says it is void as to creditors because fraudulent, and for this reason asks to be invested with the title which it fraudulently conveyed. He cannot claim *under* it, and must claim *against* it. When it is decreed fraudulent and void at his instance, how can *he* set it up to defeat the right of the wife to dower? Such a position involves this inconsistency, that it asks that the same instrument be held void as to creditors, and then in their favor held valid as to the wife. * * * When we consider the intimate and confidential relations between husband and wife; the control and influence of the latter over the former in matters of business; the public policy in which the right of dower has its origin and support in the law, namely, a provision for the widow; and that if the fraudulent conveyance had not been made, the dower right would have been beyond the reach of the creditors or the assignee; we find it difficult to resist the conviction that, as between the wife and the assignee, the equity as to the dower right is with her, and that to deprive her of it is, in substance and effect, to punish her for the intended, but (by the decree the court makes) the ineffectual fraud of the husband."[8]

In such cases, the doctrine of *estoppel* has been urged by the successful creditor against the demand of the widow for an assignment of dower. But, although it has been intimated in one case,[9] and doubted in another[10] and denied in a third,[11] that, as against the grantee, she is estopped by her deed to claim dower, yet all the cases seem to agree that such an estoppel does not operate in favor of a creditor,[12] in favor of an assignee in bankruptcy[13] or other stranger to the conveyance; since "an estoppel, to be binding, must be reciprocal, and parties and privies only are bound thereby."[14] In the Kentucky case, where the question was directly presented as between the wife of the fraudulent grantor and the grantee, it was held that the former was not estopped by her relinquishment of dower to claim it again as against the grantee.[15] In Ohio the same conclusion has been reached; but upon the broader ground that, since the wife's dower is not answerable for the husband's debts, *as to it, there can be no fraudulent conveyance.* And since the wife in such cases acts under the influence of her husband, a court ought not refuse her its aid in recovering her dower from a grantee to whom she has conveyed it without consideration, she having been guilty of no fraud.[16]

(8) Cox v. Wilder, 2 Dillon, C. C. 45; U. S. Circuit Court, Eastern District of Missouri; opinion by Dillon, Circuit Judge; Krekel, District Judge, concurring. Approved in FeFarland v. Goodman, 6 Bissell, 117; Hopkins, J.

(9) Cox v. Wilder, *supra*,

(10) Robinson v. Bates, 3 Metcf. (Mass.) 42.

(11) Lockett v. James, 8 Bush. (Ky.) 28.

(12) Robinson v. Bates, *supra*

(13) Cox v. Wilder, *supra*,

(14) Wilde, J., in Robinson v. Bates, *supra*.

(15) Lockett v. James, 8 Bush, 28. The facts were, that a decree having been rendered setting aside the fraudulent conveyance at the suit of creditors, the grantee appealed, on the ground that the court erred in exposing the dower interest to sale in payment of the husband's debts. The court, after referring to its former decisions upon the subject, Lowry v. Fisher, 2 Bush, 70, and Dugan v. Massey, 6 Bush, 81, said that they were not conclusive of the question whether the surviving wife is not estopped by her relinquishment of dower in the fraudulent conveyance as against the grantee in that deed. "If she is," said the court, "it must logically result that the appellant could successfully resist the judgment of sale as to the dower which she claimed." In saying this the court evidently overlooked the principle that, the husband living, the wife's potential right of dower can not be disassociated from the fee. It is either lost entirely, as where the wife relinquishes it to the owner of the fee, or it inheres in the fee, as where the land is sold to pay the husband's debts. See Summers v. Bobb, 13 Ill. 483; Wilder v. Cox, 2 Dill. C. C. 45. It would seem that this would have been a clearer ground on which to rest the conclusion of the court than on the non-existence of an estoppel. "But," continues the court, "the absolute invalidity of the deed as a conveyance of the legal title being judicially established and admitted, we are of the opinion that, upon its avoidance at the instance of the creditors of George Payne, it was no longer effectual as between the appellant and the surviving widow as a bar to her right of dower, either as a conveyance or an estoppel. 1 Scribner on Dower, 610; 1 Washburn on Real Property, 213; Robinson v. Bates, 3 Metc. 40. This case differs essentially from that of Cantrill v. Risk, 7 Bush, 160, in which the wife of a grantor was held to be bound by her relinquishment of dower in a deed which was not avoided for actual fraud, but made to operate under the act of 1856, as an assignment of the grantor's property for the benefit of creditors." Compare Edmondson v. Hyde, 2 Sawyer, 205.

(16) Woodworth v. Paige, 5 Ohio St. 70; opinion by Thurman, J.

GUARDIAN'S SALES—LIMITATIONS.

MILLER v. SULLIVAN.

U. S. Circuit Court, District of Nebraska, November, 1877.

Before Hon. JOHN F. DILLON, Circuit Judge, and Hon. ELMER S. DUNDY, District, Judge.

1. SALES OF REAL ESTATE BY GUARDIAN.—The Legislation of the State of Nebraska, as respects sales of real estate by guardians, considered, and the principles of Grignon's, Lessee v. Astor, 2 How. 319, adopted and applied.

2. SAME—STATUTE OF LIMITATION.—The special five year's statute of limitations for the protection of the rights of a purchaser of land at a guardian's sale is available to the holder of the title thus acquired, even though the sale by the guardian might not be good if it had been attacked within the five years.

There is no controversy over the chain of title of plaintiff—it being from the United States to Toulsant Kensellur, a half-breed Indian—from him to William Miller, and from Miller to the plaintiff. The title of the defendant is one acquired by virtue of proceedings had in the probate court of Richardson county, Nebraska, upon application of the guardian of the patentee, who was a minor.

The material questions in the case relate to the validity of the guardian's sale of the land and the effect of the five years statute of limitations in respect of such sales.

The records of the probate court at and before the time when the sale was made by the guardian, were loosely and imperfectly kept. The then probate judge testifies that the county furnished him no record books, and he kept the appointments, orders and proceedings in his court on sheets put away in envelopes. The original appointment of the guardian, and that he took the oath required by law, appear on the files of the probate court, and by recitals in the license of February 10, 1862. The bond required of a guardian on his appointment was given and approved and is still extant, and is substantially in the form required by law. The petition of the guardian in 1864, to sell the land now in controversy, duly sworn to and containing all the essential requirements of the statute, is still on the files of the probate court. A bond of the guardian not dated and not appearing to be proved reciting the license to sell, is also on the files of that court.

No report of sale under the petition and license of 1864 is on file in the probate court. The then probate Judge testified that the bond was approved; that the sale by the guardian was reported to and approved by him, and that the land sold for its full value. The guardian's deed, dated January 10, 1865, recites a sale of the land in controversy, September 5, 1864, after notice in a public newspaper. The guardian was the father of the ward.

No notice of the application of the guardian for license to sell was served upon the father, he being the guardian and next of kin, or on the minor, nor upon any other person; but the aunts of the minor, who seem to have been supposed to be his next of kin, or part of his next of kin, were of age, and authorized an attorney to appear for them, and he did so appear in the probate courtand "waived notice to bring in the next of kin."

The statute then in force on the subject of Guardian Sales, section 7, required "that upon the presentation of this petition (to sell), the court shall thereupon make an order directing the next of kin of the ward, and all persons interested in the estate to appear," etc.

Section 8 provided: "A copy of such order *shall be personally* served on the next of kin of such ward, and all persons interested in the estate. * * * " In section 42, of the succeeding chapter, the legislature uses this language: "All those who are next of kin and heirs, apparent or presumptive of the ward, shall be considered as interested in the estate."

When personal notice of the time and place is required to be given, they (the next of kin and heirs apparent) shall be notified as persons interested according to the provisions respecting similar sales by executors and administrators, which provisions are that it must be personally, by publication, or assented to in writing, by "all persons interested in the estate."

Section 23 of the Guardian's act under consideration, provides that the sale shall not be avoided on account of irregularity in the proceedings, provided it shall appear: 1. That a guardian was licensed to make the sale by a Probate Judge of competent jurisdiction. 2. That he gave bond. 3. That he took the oath. 4. That he gave notice of the time and place of sale as prescribed by law. 5 That the premises were sold accordingly at public auction, and are held by one who purchased in good faith.

The statute of Nebraska also provides, "No action for the recovery of any real estate sold by a guardian * * shall be maintained by the ward, or by any person claiming under him, unless it be commenced within five years after the termination of the guardianship, excepting," etc. Terr. Laws Neb. 1861, p. 68, sec. 22; Gen. Stat. Neb. p. 287, sec. 63.

The land in question was purchased at Guardian's sale in good faith, and the defendant and those under whom he claims have been in actual possession of it ever since. It was unimproved when sold by the guardian, and has been improved by the purchaser from the guardian. This suit was not brought within five years after the minor attained his majority, which, of course, terminated his guardianship.

A jury was waived, and the cause was submitted to the court upon evidence which showed the foregoing facts.

Mr. Ambrose, for the plaintiff; *Mr. Manderson* and *Mr. Martin*, for the defendant.

DILLON, Circuit Judge:

This case presents questions of great importance. I have considered them deliberately, but shall dispose of them briefly.

The statute of Nebraska did not require notice of the application of the guardian for license to sell to be served upon the minor or ward, but only "on the next of kin and all persons interested in the estate."

If we consider as proved the facts testified to by the probate judge in connection with what is shown by the records of the probate court, the most serious defect alleged to exist in the sale arises out of the want of service of notice upon the next of kin and others interested in the estate. The guardian was duly appointed, took the required oath, gave bond, filed a petition to sell; the aunts of the minor authorized an attorney to appear for them and waive notice, which he did; a license to sell was granted, a bond was given and approved, and a sale was made in good faith and confirmed, and a guardian's deed executed and possession taken under the sale and maintained ever since.

Guided by the views of the Supreme Court of the United States, I doubt very much whether under the Nebraska statute the application of a guardian for a license to sell should be regarded as an adversary proceeding as against the "next of kin and all persons interested in the estate" of the ward. Grignon's Lessee v. Astor, 2 How. 319. Thompson v. Tolmie, 2 Pet. 157: Cooper v. Reynolds, 10 Wall. 303; Good v. Norley, 28 Iowa, 188, and cases cited on page 208. The Supreme Court of Nebraska has never held otherwise upon this statute. But, whatever may be the true view on this point, I am of the opinion that the five years limitation, provided by the statute of Nebraska in respect of sales by guardians, will protect the sale in question. The sale was made by a guardian duly appointed and who duly qualified; a petition for a sale was presented and granted; a bond was given; the sale was made at public auction after the prescribed notice had been published. If the father was the next of kin, he, of course, had notice, being the guardian, and the aunts of the minor authorized an attorney to appear for them, and he did so appear and waive notice. Possession was taken under the sale, and more than five years elapsed after the minor attained his majority, before this suit was brought. I am of the opinion that the five years limitation statute applies to such a sale and protects the purchaser.

Such a purchaser can avail himself of the bar afforded by the statute without showing a sale which would have been valid if it had been attacked within the five years. Holmes v. Beal, 9 Cush. 223; Norton v. Norton, 5 Cush. 524; Arnold v. Sabin, 1 Cush. 525; Wilkinson v. Leland, 2 Pet. 627; Howard v. Moore, 2 Mich. 226; Coon v. Fry, 6 Mich. 506; Pursley v. Hays, 22 Iowa, 35; Good v. Norley, 28 Iowa, 188; Boyles v. Boyles, 37 Iowa, 592; Dolton v. Nelson, 3 Dillon, 469;.

I stand by my opinion in Good v. Norley, 28 Iowa, 188, 206.

The case might be different—I do not say it would be—if no possession had been taken and maintained under the purchase for more than five years after the termination of the guardianship. It might be different if one had assumed to make a sale as guardian, who had never been appointed guardian or licensed to make the sale. But we need not consider such supposed cases.

Upon the actual case before us, we think the statutory bar is effectual, and that the defendant is entitled to judgment. This is a wise statute, doubly wise in a new country, for reasons which appear fully in this case. It would be robbed of its virtue if it was confined to cases when the sale was valid, for such sales do not need the protection of such a statute. They that are whole need no physician.

DUNDY, J., concurs.

JUDGMENT FOR THE DEFENDANT.

NEGLIGENCE — LIABILITY OF RAILWAY CORPORATIONS — CONTRIBUTORY NEGLIGENCE.

PEORIA AND ROCK ISLAND RAILROAD COMPANY v. LANE.

Supreme Court of Illinois, September Term, 1876.

[Filed October 17, 1877.]

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
Associate Justices.

1. LIABILITY OF RAILWAY COMPANY.—A railway corporation, owning the road and franchise over which another railway corporation has a right under contract to run and operate its trains, is liable in damages for injuries resulting from the negligent use of the said track and franchise by the servants of the second company.

2. CONTRIBUTORY NEGLIGENCE—LEAVING PASSENGER CAR.—A passenger, leaving his seat in a passenger car (there being an abundance of room), while the train is in motion and going into the baggage car, where he is injured by falling baggage, upon the car being overturned, is guilty of contributory negligence, and no action lies for the injury.

WALKER, J., delivered the opinion of the court:

It appears that appellant was the owner of the track, right of way and franchise of the road, where this accident occurred. They had entered into an agreement to permit the Rockford, Rock Island and St. Louis R. R. Co., to run trains over their road, from Rock Island to Orian. The latter road was to pay the former, $31.000 per year, and half of the gross recipts for the local business between the two points. The accident occurred by the overturning of a baggage car, in a train operated by the Rockford, Rock Island and St. Louis Company.

It is first urged, that appellant is not liable for the negligence or mismanagement of the employees of that company, whilst running on their track. That the Rockford, R. I., R. R. Co., are alone liable for their negligence. There is no doubt but they are liable for their own acts; and some courts have held, that the company owning a road is not liable for the negligence of their lessees, or of other roads using their track by arrangement or consent. But this court has repeatedly held, that a railroad, holding the franchise and exclusive right to operate a road, must so use it, as not to endanger passengers or property, whether the use be by themselves or others they may permit to use the road, and that, if they permit another company to use their trains, on and over their track, and injury grows out of negligence in the use of the road thus authorized, the company owning the road and franchise, will also be liable. Lesher v. The Wabash Nav. Co., 14 Ill. 85; Hinde v. Same, 15 Ill. 72; Chicago, St. Paul and Fon Du Lac R. R. v. McCarthy, 20 Ill. 385; Ohio & Miss. R. R. v. Dunbar, Ib. 623; Sidders v. Riley 22 Ill. 109; Ill. Cent. R. R. v. Finnigan, 21 Ill. 646; Ill. Cent. R. R. v. Kanouse, 39 Ill. 272; Toledo & P. & W. R. R. v. Humbold, 40 Ill. 143.

These cases fully settle the rule in this court. Nor has appellant's counsel adduced reasons in argument, that by any means satisfy us that a sound public policy does not require the rule. It has been adopted with a full knowledge that there are decisions of other courts, for whom we have great respect, announcing a different rule. But there are other courts, with equal ability, who announce the rule, adopted by this court. We cannot be expected to change a rule, simply to make it conform to that of some other court, arriving at a different conclusion. We have no doubt of the soundness of the rule of this court, and must, therefore, decline to review the conflicting decisions of the various courts. The same rule is announced by the Supreme Court of the United States, in Railroad Co. v. Barron, 5 Wal. 104; see also Nelson v. V. & C. R. R. 26 Vt. 721. This objection cannot, therefore be allowed.

This being true, it follows that if the switch was not properly locked, or otherwise secured, whether by the employees of either road, and the injury was thereby occasioned, appellants would be liable. Or, if the switch was not properly constructed and maintained, appellants, as the owners of the road, would be liable. On this question there was a large amount of evidence which was inharmonious in its character, and which was for the jury to determine under proper instructions. The first of appellee's instructions, to which objection is made, is in entire harmony with the rule above announced, and the same is true of her fifth instruction. We perceive no objection to the eighth or ninth of the series.

The sixth of appellee's instructions is objected to by appellant. It is this: "6. The jury are further instructed that, while it is true that the proper place for a passenger while riding upon a railroad train, is in the passenger coach, yet, the jury are further instructed that a passenger may rightfully be in a baggage car, and not thereby be chargeable with negligence, such as to excuse the railroad company, upon whose train such passenger may then be riding, from the performance of its duties imposed upon it by law, in properly building and maintaining its road, with its curves and switches, or persons operating trains of cars upon its track, with its consent, from gross negligence in the running and management of a train upon which such passenger may then be riding."

It is urged that this instruction does not state the law correctly, and the instruction misled the jury. In the case of Galena & Chicago U. R. R., v. Yarwood, 15 Ill. 468, it was held, where the passenger cars being full, and Yarwood paid for a ticket, and on entering the cars was directed by the conductor to go into the baggage car, which he did, but afterwards left that car, and, while standing up in one of the passenger cars it was apparently about to be thrown from the track, and he jumped off and had his leg broken, that he could not recover. It appeared in that case that, if he had remained in the baggage car as directed, there would have been no apparent necessity for leaping from the train, and he would not have been injured. So, in this case, had deceased remained in the passenger car where there was an abundance of room, he

would not have been killed. It was by reason of his having his seat in the passenger car, not by direction of the conductor of the train, but for the purpose of getting a plate of iron and some other small articles in the baggage car, that occasioned his death. He, as all others, knew that the baggage car is not designed for passengers. It is alone for baggage, express matter and such articles as passengers may be permitted to place therein as a matter of convenience, and for the use of employees on the train. When there are large quantities of baggage piled up in that car, in case of accident persons therein would be liable to have it fall on them and produce great injury if not death, as was done in this case. This, therefore, renders it more hazardous than in the passenger cars. They are so constructed as to be free from such or like dangers. He must have known that the payment of his fare entitled him to a seat in a passenger car, and in consequence of that knowledge he appears to have taken a seat therein, upon entering the train. The company did not expect or intend that passengers should occupy the baggage car, and hence they had not arranged it with a view to the safety of passengers. Had they designed it for that purpose, they would have arranged the baggage differently, so as to secure passengers from injury from its falling on them. Deceased left a place of safety and sought one of danger, and this lost his life. His doing so was not invited or directed by the company. He, in going there, was guilty of a high degree of negligence, so high, in fact, that the company are exonerated from liability, unless the company were guilty of wanton or reckless misconduct on their part. Although the company may have been guilty of negligence, which we do not decide, still we do not see that it was wanton or reckless. The road at that place may not have been constructed on the very best plan, yet, it was not gross negligence in comparison with that of deceased, and is slight. Deceased was manifestly guilty of as great negligence as the company, if not greater. Suppose he had got on the frame in front of the engine without being directed to do so, and had been injured, could it be contended that he might recover? Surely not; because he had sought a situation of great peril. When persons take such and like hazards of their own choice, they must bear the injury. Had deceased acted with ordinary prudence, and remained in the passenger car where it was his duty to have remained, he would not have been killed. Nor does it matter that the conductor testified that passengers could go into the baggage car. As, where a person buys a ticket, the act implies that the company shall furnish him with a seat in a car provided for passengers, and not in a car provided for baggage. Such a ticket does not entitle the passenger to go therein without permission. This instruction should not have been given.

All of appellants instructions, but the 4th and 10th, which were refused, are in the teeth of the decisions of this court referred to in the former part of this opinion and were properly refused. The fourth would have been free from objection had the last clause referring to negligence of the Rockford, Rock Island & St. Louis railroad company been omitted. The tenth was manifestly wrong, as this was a civil action, and all know that in such cases, only a preponderance of evidence is required to establish facts, and not that the evidence shall leave no reasonable doubt on the minds of the jury. We are surprised such instructions should have been asked.

But for the error in giving the sixth of appellees instructions a majority of the court hold that the judgment of the court below must be reversed and the cause remanded.

JUDGMENT REVERSED.

CONSTITUTIONAL LIMITATIONS — MUNICIPAL COURTS—REMOVAL OF CAUSES.

PEOPLE *EX REL.* HEATH v. CIRCUIT JUDGE.

Supreme Court of Michigan, October Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, }
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }

1. CIRCUIT COURTS NOT TO BE SUBORDINATED TO MUNICIPAL COURTS.—Where circuit courts are established by the constitution with "original jurisdiction in all matters * * not excepted in this constitution and not prohibited by law," a law giving a local or municipal court such powers as would substantially enable it to revise the action of the circuit, is invalid.

2. LIMITATION UPON REMOVAL OF CAUSE TO CO-ORDINATE COURT.—Where a cause has once begun to be heard in a court of general original jurisdiction, it can not thereafter be removed to a municipal court of co-ordinate powers, as that, in effect, would be to subordinate the general to the local court.

3. CASES SUB JUDICE NOT REMOVABLE.—A cause had been heard on its merits, and a decree therein for an accounting partly executed. *Held*, too late to remove it to a co-ordinate court.

CAMPBELL, J., delivered the opinion of the court:

A suit was brought by relator in the Circuit Court for the county of Kent, to obtain an accounting concerning partnership matters against Waters and Renington. A decree for accounting was made March 23, 1872, and the proceedings to account were begun and progressed before a circuit court commissioner. In March, 1877, an order was made for further proceedings before the commissioner then in office, who, on the 26th day of April, 1876, had completed his examination and prepared to make his report when the defendant Waters applied to open the reference and take further proofs and cross-examination. The permission was granted in part and in part refused. Waters appealed to the circuit court where the action of commissioner Walcott was affirmed. He then appealed to this court and his appeal was dismissed on the 24th of April, 1877, on the ground that the order complained of was not appealable.

A report as to one of the defendants, Renington, had been made December, 31, 1872, and confirmed.

On the 19th day of May, 1877, an act was passed by the legislature amending the act organizing the Superior Court of Grand Rapids enlarging its jurisdiction and providing, as is claimed, for the transfer of causes from the Circuit Court for the County of Kent at stages in which they could not before be transferred, and in a manner excluding any control by the circuit court. Two days after the passage of this act, which was given immediate effect, on the 21st day of May, 1877, a petition and bond were filed for the removal, and the circuit court therefore made an order refusing to proceed further. At that time, a petition was pending to have the reference removed for completion to the new circuit court commissioner, Mr. Adams, who had succeeded Mr. Wolcott. The case has since been referred by the supreme court to a commissioner to complete the accounting.

Relator now moves for a mandamus to compel the circuit court to resume control of the cause.

The original act creating the superior court provided for the transfer of any cause which might have originally been brought there if the act had been in force, upon filing certain documents; "Provided, however, that no cause pending in said circuit court, when this act takes effect, shall be thereafter removed under the provisions of this section, during a trial on hearing thereof," L. 1875, pp. 46-7.

The act of 1877 (p. 142), provides for removing any cases then pending at law or in equity "Provided, however, that no action at law pending in said circuit court when this act takes effect shall be thereafter removed under the provisions of this act during a final trial thereof."

Upon a fair examination of this language we do not think it is ambiguous. It in terms allows a transfer of chancery causes at any time during their pendency. It is quite likely that in this case, as in many other statutes concerning judicial proceedings, the legislature has acted without fully considering the effect of the statutes adopted. We can not doubt the intention of the draughtsman of this extraordinary enactment. The parties have brought themselves within its terms. We are therefore to consider its validity.

In the case of The People *ex rel* Jones v. The Judge of The Kent Circuit, April Term, 1877, we held that the original statute (which is, in some respects, not so broad as the new one), was broader than it could lawfully be made, and that no legislation was valid which in any way subordinated the circuit courts to the superior court; that the superior court was and must be no more than a municipal court, and could have no jurisdiction which did not come within the scope of municipal judicial action.

The circuit courts are the highest courts of general original jurisdiction in the state, and they are given by the constitution itself, "original jurisdiction in all matters, civil and criminal, not excepted in this constitution and not prohibited by law; and appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same." Any legislation concerning municipal courts which interferes with the constitutional jurisdiction of the circuit courts, or which allows the local court to revise or change the action of the general court, is very clearly illegal. If the municipal court is not inferior to the circuits, it can not be made superior. If it is made a court of coordinate powers, it is made so on the principle that for the purposes of that jurisdiction the city is regarded as a separate district or territory having, to a certain extent, its own court as it would have if no connection existed with the county for judicial purposes. The constitution does not permit any such actual severance of territory except in a qualified sense. It does not contemplate any greater authority than that severance would create without trenching upon the necessary powers of the circuit.

Municipal courts have existed from time immemorial and their functions are not unknown. The Courts of London have always had jurisdiction, both civil and criminal, legal and equitable; and cases arising in the highest of those courts were reviewable before a special commission of errors composed of justices appointed by the King and sitting at the Church of St. Martin le Grand, from whose decision error lay to the House of Lords. Fitz N. B. 22, 23; 3 Bl. Com. 80-810, notes. The jurisdiction was concurrent in most respects with that of the royal courts, and since the modern changes of procedure the judgments have been made reviewable in the Exchequer Chamber or in the superior court of appeals, and not in the lower courts of appeals or the Queen's Bench. Le Blanch v. Reuter's Telegraph Co., L. R. 1 Ex. Div., 408. But the jurisdiction is, and always has been, rigidly confined to causes arising within the jurisdiction or persons subject to it. The recent change of courts in London has brought these matters for the first time within the usual series of law reports, and it is manifest that while the municipal tribunals have authority over controveries of the same dignity as others, they can not go outside to reach them. See Taylor v. Jones, L. R. 1 C. B. D., 87; Taylor v. Nicholls, Id. 242; London Joint Stock Bank v. Mayor of London, Id., 1; Ellis v. Fleming, Id., 237; Hawes v. Pooley, Id., 418; Water v. Elliott, Id., 169: Bridge v. Branch. Id., 633.

The controversy in the case before us, being one where all the parties and all the subject-matter are within the city of Grand Rapids, the case, if now commenced, would on these principles be subject to disposal by the superior court. But when this law took effect there had been a hearing on the merits, and a decree for accounting partly carried into execution, nothing being left for future inquiry but the pecuniary balance and the consequent determination of the final measure of relief.

To remove a case after there has been action upon the questions involved on its merits by the circuit court, involves, if it be lawful, a power in the superior court to do thereafter whatever the circuit court could have done had there been no removal. This would give to the superior court what is practically an appellate power of reviewing and and reconsidering what has already been decided at the circuit This, we think, is not allowable. So long as the circuit court has not entered upon the hearing of the cause it can not be said to have involved any judicial action. But as soon as a court enters upon a hearing and the case is *sub judice*, we think it can not thereafter at any stage be snatched from the custody of the tribunal hearing it without the exercise of the power which could subject it to appeal.

The analogy of the United States Statutes for the removal of causes from state courts, to courts of the United States, does not apply. The authority to remove is asserted by the United States Supreme Court to rest on a plenary power in Congress to provide for such cases as the constitution allows to be cognizable in the national courts. It is not easy to justify it on any theory, and there is certainly no power in our legislature to give municipal courts supremacy over others.

The framers of the statute under consideration have acted upon the theory that there is no limit to legislative power in this regard, and the act is a remarkable one. We are not called upon to deal with it beyond the case before us. We think the transfer of the chancery suit to the superior court was unlawful, and that the case is still in the circuit where it must be proceeded with. The mandamus is allowed.

COOLEY, C. J., and GRAVES, J., concurred.

NOTE.—The decision in De Hart v. Hatch Jan., 1875, 3 Hun. 375, 6 T. & C., 186, supports the decision taken above, on a basis of careful reasoning. It holds absolutely unconstitutional and void certain New York statutes providing that any of the courts therein named may, by an order entered on their minutes after the joining of issue, transfer certain classes of actions pending therein to the Marine Court. In this case, an order had been entered for the transfer of a cause from the supreme court, but on appeal the court declares that as the constitution has conferred upon the supreme court *general* jurisdiction in law and equity, the legislature is powerless to abridge or limit such jurisdiction either with or without the consent of that court, as otherwise it would lose its constitutional character as a court of general jurisdiction. The same ground had also been taken by Judge Sedgwick of the Superior Court of New York City, in a dissenting opinion in Alexander v. Bennett, 1874, 38 N. Y. Superior Court Reports, 505. Another reason was given, in Deck's Estate v. Gherke, 1856, 6 Cal., 666, wherein the court held a statutory provision for the transfer to the district court of issues of fact already decided in the probate court, unconstitutional and void, on the ground that as the power to try over again issues that have already been tried and decided, necessarily includes the power to reverse or modify the decisions made, the effect of the act would be indirectly to confer an appellate jurisdiction unwarranted by the state constitution. The case of the Northern Central Railway Co. v. Rutledge 1875 51 Md., 372, contains a well-reasoned

argument against the transfer of a cause even after judgment has only been taken by default. An action begun in the Circuit Court for the County of Baltimore, was so removed to the Superior Court of Baltimore City, under a provision of the constitution, allowing the removal of a cause from one court to another upon a sworn showing by either party that he can not have a fair trial in the court where the action is pending. The decision is based on the objection that the exercise of the right of removal at that stage, makes the court to which the case is removed a tribunal of appeal. The opinion states, also, as established law, that after the empanneling of a jury a case can not be removed to another court.

Aside from statutes, it is well settled as common law that where two courts have concurrent jurisdiction of the same subject-matter, the one in which the suit was first begun, is entitled to retain control of the matter.

H. A. C.

REMOVAL OF CRIMINAL CASE FROM STATE TO FEDERAL COURT—MURDER.

STATE OF GEORGIA v. O'GRADY.

United States Circuit Court, Northern District of Georgia, September, 1876.

Before Hon. W. B. WOODS, Circuit Judge, and Hon. JOHN ERSKINE, District Judge.

1. WHEN CAUSE REMOVABLE.—Under § 643 of the Revised Statutes of the United States, providing for the removal of criminal cases from a state to a federal court, the prosecution is not commenced until the finding of an indictment.

2. CHALLENGES.—In such a case, the right of the defendant to challenge jurors is governed by the laws of the United States.

3. ON AN INDICTMENT FOR MURDER, the guilt or innocence of the prisoner must be determined by the laws of the state.

This is believed to be the first important criminal case removed from a state court and tried in a United States Court under the famous "Force Bill" of 1833, re-enacted in the Revised Statutes of the United States, section 643.

In January, 1876, three United States soldiers, belonging to the garrison in Atlanta, Ga., were arrested in Gilmer County, Ga., under state process, for the alleged murder of one John Emory, a citizen of that county. After examination by the magistrates, they were committed to prison to await trial.

They then petitioned the Circuit Court of the United States, for the Northern District of Georgia, the district which includes Gilmer County, for the removal of the cause into that court by the writ of *habeas corpus cum causa*, under the provisions of section 643 of the Revised Statutes of the United States, alleging that the prosecution was for acts done by them while acting under a revenue officer of the United States, and on account of a right claimed by them under the revenue laws. The court not being in session, the petition was presented to the clerk, who issued the writ. This was served, and the marshal took the prisoners into custody and took them before the Hon. John Erskine, United States District Judge.

On motion of the Attorney-General of Georgia, Judge Erskine, after argument, directed the marshal to return the prisoners to the state officers, holding that the prosecution was not commenced, in the meaning of that section of the revised statutes, until the finding of an indictment.

At the next term of the Superior Court of Gilmer County, in May, 1876, an indictment was found against the three prisoners for the crime of murder, charging one of them O'Grady, as principal in the first degree, and the two others, Wells and Newman, as principals in the second degree, as accessories before the fact and as accessories after the fact.

The prisoners then petitioned anew for the removal of the cause into the United States Circuit Court and for the writ of *habeas corpus cum causa*. The circuit court was not in session, and therefore the petition was presented to its clerk and filed in his office. He issued the writ, and it was promptly served on the clerk of Gilmer Superior Court by the marshal. The prisoners then moved that court for two orders—one directing the clerk to certify and send the record to the circuit court; the other, that the sheriff should deliver the prisoners to the United States marshal. The court, Hon. N. B. Knight presiding, after careful examination of the writ, became satisfied that it conformed to the act of congress, and granted the orders. The marshal took the prisoners to Atlanta and applied for the direction of Judge Erskine, who ordered that they should be held in prison by the marshal for trial at the next term of the circuit court, but permitted Wells and Newman to be released if they should tender sufficient bail, in an amount fixed by him, a state judge having previously pronounced their offence to be bailable.

At the next term of the circuit court Woods, circuit judge, and Erskine, district judge, sitting, the prisoners were arraigned and pleaded not guilty, and claiming the right to be tried separately, O'Grady was put on trial.

The question arose whether the parties should respectively have the number of challenges of jurors allowed by the law of Georgia or the number allowed in cases of the same class by the law of the United States. The court decided that in this matter the law of the United States was applicable, and accordingly allowed to the prosecution five peremptory challenges, and to the defence twenty, as provided in section 819 of the revised statutes.

The evidence showed that the three soldiers belonged to a detachment that had been sent from the garrison in Atlanta to aid the deputy collector of internal revenue and the deputy marshal of the United States in executing the law in the mountain regions of Georgia. That country is distant from markets for its farm products, and therefore presents temptations to the conversion of corn into so portable a form as whisky and abounds in obscure recesses where small distilleries can be run without much danger of general observation. The inhabitants have long been accustomed to make whisky without license or tax. The revenue law is odious to them, and they have the reputation of being ready to do violence in resisting the enforcement of it.

The three soldiers were detailed from the camp by the lieutenant commanding, to go with the deputy collector and deputy marshal on a nocturnal expedition to a neighborhoood in which illicit distilleries were reported to be carried on. When they were leaving the camp their commander told them to beware of surprise. On the way, they were informed by citizens that the neighborhood was dangerous and that their party was too small. After midnight, they found an illicit distillery in operation on the premises of Emory, the deceased; took possession of it, and arrested four persons whom they found inside. Wells, who was a sergeant, went off in search of a wagon belonging to the party, leaving Newman and O'Grady to guard the prisoners and the distillery, having placed Newman inside with the four prisoners and O'Grady outside as a sentinal, with a caution to O'Grady to challenge all comers and to be on the alert against surprises. Soon after he left, the prisoners made some movement which Newman took as hostile, and he threatened them in rather rough language, audible to O'Grady.

Emory, the proprietor, knew nothing of all this, but was sleeping in his house a few rods distant, when a friend came, waked him, and gave him information that the revenue officers were in the neighborhood. Not suspecting that they were so near, he ran from the house toward the distillery, shouting to his friends there to escape. About the time that he would have reached the distillery O'Grady fired his musket, and nothing more was seen of Emory that night by any witness. There was a conflict of testimony on the point whether O'Grady challenged before firing, Newman testifying that he heard the challenge, and the prisoners in the still-house testifying that they did not hear it. Wells and others of the revenue party soon came with the wagon, and they all left the premises, carrying away the prisoners and the still. The next morning Emory was found dead in a small watercourse near the distillery, with a fatal bullet wound in his head, and blood was traced from a spot near the distillery to the brink of the stream.

The following is the substance of the charge of the court, delivered by WOODS, Circuit Judge:

Though this case is tried in a court of the United States, it is to be determined by the law of Georgia, and you are to decide whether, under the law, O'Grady is guilty or not of the crime of murder, with which the indictment charges him. Murder is defined by the code of Georgia as "the unlawful killing of a human being, in the peace of the state, by a person of sound memory and discretion, with malice aforethought, either express or implied." Attention has been called in the argument of counsel to another species of homicide—manslaughter, which is defined in the same code as "the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever," etc. We are of the opinion that if the facts in proof in this case show any crime, it is murder and not manslaughter, and therefore you may dismiss the question of manslaughter from your consideration.

The defendant comes to this bar, like every other person charged with crime, presumed to be innocent until his guilt is proved, and the proof is sufficient for conviction, unless it excludes all reasonable doubt. It is conceded that the deceased was killed by the prisoner. This fact, without explanation, would make out a case of murder, and if no explanation were offered it would be your duty to return a verdict of guilty. But the fact of the homicide is open to explanation. The defense undertakes the explanation, and justifies the killing on the ground of self-defense. It insists that O'Grady, situated as he was at the time, had reasonable cause to believe, and did believe, that deceased was approaching him with a hostile and felonious intent, and that in consequence thereof he stood in peril of his life, or of great bodily harm If the evidence satisfies you that this view is correct, you should acquit the prisoner. To form a right judgment upon this defense, you should put yourselves in his place at the time, and look at the facts, not as they appear by the light of subsequent disclosures, but as they then appeared to him.

His counsel relies on the facts which he insists are proved, that the neighborhood had a reputation for violence towards those in the revenue service; that there was a supposed necessity of protecting and aiding them with military force; that it was right; that the prisoner was unacquainted with the ground; that his officers had warned him to be watchful against surprise; that the sergeant had ordered him to challenge everyone who might come near; that he and his comrade were guarding four prisoners, who, if reinforced, might easily overpower them, and who had manifested a hostile disposition; and that deceased came running and shouting in a manner that might well be taken for a bold assault, and did not halt when challenged, and argues that there was enough to excite the fears of a reasonable man, and to justify him in repelling the apprehended violence with a shot. You will consider all these facts, so far as they have been proved, and allow them due weight in support of the defence. The code of Georgia justifies a homicide committed in defence of one's person "against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony on the person;" but it also declares that a bare fear of such an offence shall not justify the killing. "It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears."

The defendant derives no protection from the fact that he was a soldier. It was a time of peace, and a soldier was as much bound as a citizen to respect the laws of the state. He was there as a part of the posse of the revenue officer and of the marshal, and had the same, and only the same, rights of self-defence that a citizen would have had under the same circumstances. Even if he had been ordered by his military commander to fire the fatal shot, that order, unless in itself lawful, would be no protection to him, for a soldier has no right to obey an unlawful order.

Nor can the accused derive any protection from the fact, if it be a fact, that the deceased was engaged in the habitual violation of the revenue laws of the United States. By violating the revenue laws the deceased did not forfeit his life. He was still under the protection of the law. The killing of him unnecessarily, wantonly and wilfully by a revenue officer or any of his posse would be as clearly murder as the killing of the most law-abiding citizen of the land.

It is not denied that the accused was lawfully on the spot, or that it was his duty to prevent the rescue or escape of the prisoners, but if under the pretence of performing that duty he fired on the deceased unnecessarily, wantonly and wilfully, the law holds the act to be with malice; and if you find that such were the facts of this case, your verdict should be guilty. But if on the other hand the evidence satisfies you that the accused had reasonable cause to believe, and did believe at the time he fired the fatal shot, that in consequence of the hostile approach of the deceased he was placed in peril of life or limb, and by reason of such supposed peril he fired upon the deceased, in that case it would be your duty to return a verdict of not guilty.

Under this charge the jury retired and soon brought in a verdict of not guilty. The counsel for the prosecution then entered a *nolle prosequi* as to the defendants Wells and Newman.

No objection was made to the jurisdiction of the United States Court in this case. A few days before a motion had been made to remand to the state court a case of misdemeanor that had been transferred under the same section of the revised statutes, which, after full consideration, the court denied; and as the opinion of the court on the right to remove cases of this kind was thus ascertained, it was probably deemed useless to make a similar motion in the present case.

For the prosecution, *N. J. Hammond*, Attorney General of Georgia.

For the defence, *A. T. Akerman*, *H. P. Farrow*, U. S. District Attorney, and *G. H. Thomas*, Assistant District Attorney.

A NUMBER of years since, when Mr. Cleave, the newsdealer, was tried in the Court of Exchequer on a government information, he conducted his own case, and was treated with much indulgence by Lord Lyndhurst, the judge. Cleave began his defense by observing that he should, before he sat down, give some rather awkward

PATENT LAW—DEGREE OF INVENTION NECESSARY TO SUPPORT PATENT.

MILLER & PETERS MANUFACTURING CO. v. DUBRUL.

United States Circuit Court, Southern District of Ohio.

Before Mr. Justice SWAYNE.

1. RE ISUE OF PATENT—NEW FEATURES.—Features of a machine neither claimed nor described as of the invention of the patentee in the original patent, and having no necessary relation to the features so described and claimed, but shown in the drawing and model of the original patent, may be claimed in a re-issue.

2. SAME.—Such claims held to be valid and sustained. If there is anything, no matter how slight, in a patented device, and the exact construction of the device is novel, this is sufficient to sustain the patent. The court will not inquire into this extent of the utility.

3. DEGREE OF INVENTION TO SUPPORT PATENT.—The suggestion in a patent that a device may be made in selections of one or more matrices each, will not invalidate a subsequent patent to a different patentee for the device when made in sections of one matrix each, where it appears that some advantage is obtained by making them in single sections not pointed out in the former patent.

4. CASE IN JUDGMENT.— Where cigar molds with the matrices made separate, and attached to a riged backing were old, and the complainants' alleged invention consisted in adding flanges to the base of the matrices when made in separate sections, and it appeared that defendant had several years before the alleged date of complainant's invention manufactured and used cigar molds with the matrices made in sections of four each, with flanges similar to those claimed by the complainant, and had also several years before the alleged date of complainant's invention taken out a patent, in which, while showing the matrices made in sections of five each with flanges, having rabbit joints between them also attached to a rigid backing, he had stated in his patent, that they might be made in sections of one or more matrices each. *Held*, that this was not a sufficient description of the mold made with matrices, in single sections with flanges, to invalidate complainants' patent, and that defendant must be enjoined from making flanged matrices in sections of one matrix each.

This suit was brought upon re-issued letters patent, granted Frederick C. Miller, September 28th 1875, as a re-issue of letters patent granted the same October 13th, 1874, for improvement in cigar molds.

The alleged invention related to cigar molds, which consists of an upper and lower half; the lower half being provided with sockets and the other half with corresponding matrices attached to rigid backing and intended to fit into the sockets of the lower half. The original patent contained one claim only, which was for a certain plug of wood placed in the socket of the lower half, and designed to prevent the splitting of them in that socket. This plug of wood in the lower socket was the only improvement referred to in the statement of the invention in the original specifications as being the invention of the patentee. The description of the molds in which this plug was used, taken in connection with the drawings and model, showed a certain flange upon the bases of the matrices of the upper half of the mold. These flanges, however, were provided for an entirely different purpose from that designed to be answered by the plugs in the lower half of the mold, and sustained no relation to such plugs. The patent was re-issued with the two claims recited in the opinion, the subject-matter of which was these two flanges.

It appeared in evidence that cigar molds known as the "Old German" mold, had been in common use in this country many years prior to the alleged invention. These molds were constructed of wood, the same material used by complainants, with small sockets used in the lower half of the mold, and separate matrice or matrices in sections of one each, attached to rigid backing by glue or nails, or both, forming the upper half-mold. They differ from the complainants, so far as the point here in controversy is concerned only in backing the flanges at the base of the matrices of the upper half-mold. It was claimed by the complainant that these flanges somewhat facilitated the construction of the mold. Registration was secured in the old German mold by the laying the cups of the upper half-mold in the sockets of the lower, then applying glue to the back of the cups, afterwards placing the rigid backing board upon them. The cups would adhere to this backing, and being withdrawn in their proper position, could then be nailed or riveted firmly to the backing-board. Complainant claimed that by the use of this flange the matrix was retained in position in the lower socket while receiving the glue, and until the glue was dried, thus securing more perfect registration and cheapening the cost of the mold. Among the patents set up as anticipation aside from the old "German mold," were patents granted the defendant himself, May 16th, 1871, and May 9, 1871, and the patent granted Maguire May 6, 1873, all for improvement in cigar molds.

It was also shown in the evidence that the defendant had, as early as 1870 and 1871, manufactured and sold cigar molds, having the matrices made in sections of four each with the flange at their base like the flange claimed by the complainants, and used with the corresponding lower half. The patent to defendant of May 16, 1871, showed the mold with the matrices made in sections of four or five each, also provided with these flanges. The several sections were shown in this patent connected by rabbit joints between the matrices. The patent described the mold as made preferably of iron or sheet metal, but stated that any suitable material might be used. Wood was shown to be the material common in use for that purpose at that time. It also stated that the matrices might be made in sections of one or more each. That patent to Maguire showed similar matrices attached to a similar backing by glue, and with flanges extending from matrix to matrix, but made in a single section, that is, the matrices of the entire molding connected by their flanges without division between the flanges. The defendant denies the validity of the issue, and the novelty and patentability of the alleged invention. He admitted that he had made cigar molds with flanges in some respects resembling those shown in the reissued patent, but claimed that he did so under and in accordance with the patents granted to himself in 1871, and subsequently he denied that he used any other feature of the alleged invention.

It was also specially insisted upon by the defendant at the hearing that, as complainants' alleged invention consisted, at most, only in adding the flanges to the bases of the cups or matrices, which were otherwise used precisely as in the old German mold, and as he had described and shown and used such flanges upon the bases of matrices, when made in sections of four each, as early as 1871, and had in his patent also stated that they might be made in sections of one each, which would make them the same as the complainants, he had a right to proceed under his patent of 1871, to make the molds there shown with the matrices divided into sections of one each. It was also insisted that as the claims were not limited to the cups when made in sections of one each, the defendant's patent of 1871 and the molds made by him at that time, even if used without the suggestion as to dividing them into sections of one each, each mold would be a complete anticipation; also, that the Maguire mold would be a complete anticipation of the claims, and that if the claims were limited

to the mold when the matrices were in sections of one each, it requires no invention to divide up the Maguire into sections of one each, precisely as the "Old Gererman mold" has been divided. It was also insisted that, as the only merit claimed for the flanges was in the process of construction, and not in the completed mold where it performed no functions other than was performed by the backing of the old German mold, the patent should have been for the machine as completed; that the claim was not capable of that construction, and that, if so construed, there was no evidence that the defendant used the process of construction in which the complainant claimed to get some advantage from the flange. It also appeared in evidence that the defendant's patent of 1871 had been reissued with claims for those flanges.

Mr. Justice SWAYNE:

This is a suit brought on re-issued letters patent for improvement in cigar molds, granted F. C. Miller, September 28, 1875, as a re-issue of letters patent originally granted same, October 13th, 1874.

The bill charges the infringement of the first and second claims, which are as follows:

"1. The series of cups *c*, which are constructed with flanges *c*, and attached to suitable backing substantially as and for the purposes specified. 2. The movable half-mold composed of a series of cups *c*, and attached to a backing in combination with the stationary half-mold, having a corresponding series of sockets *d*, substantially as and for the purpose specified.

The defenses relied on are 1st. That the re-issue is broader than the original and not for the same invention. 2d. Want of novelty. 3d. Want of patentable invention.

As to the validity of the re-issue it is delegated by the act of Congress upon the subject to the Commissioner of Patents, carefully to examine the question whether the patentee is entitled to a re-issue, and to decide according to the result of that examination. The presumption of law is, according to the authorities, that the commissioner has done his duty thoroughly, faithfully and properly, and has arrived at a conclusion in accordance with his action.

The question is not open for re-examination except on the ground for fraud. Batters v. Taggert, 17 Howard, 84; Rubber Co. v. Goodyear, 9 Wallace, 796, Seymour v. Osborne, 11 Wall. and others. The presumption is that everything is correct and valid touching the re-issue.

I have found nothing in the case sufficient to open up that question for examination. I need not remark on the subject. On looking through the patents which have been introduced on the part of the defendant, and examining the models which show the invention, we find nothing that *exactly* anticipates said invention. In this connection it is proper to read a part of the specification." The flanges or cups of the upper or movable half-mold, are found separately and subsequently secured in the backing, while in the sockets in the lower or stationary half-mold, in order to obtain a perfect register between the cups and the sockets: heretofore the cups have been made of the same width, or nearly so, from top to bottom—that is to say, the width at the top at a particular point, would be the same or nearly so, as the width at the bottom at this same point, and the face of the backing to which they are attached checked their further entrance into the sockets by bringing up against the top of the socket-board. By reason of this construction of the cups it was exceedingly difficult to secure the backing to it without injuring the cups on the surface of the sockets, by forcing the cups too far into the sockets, and, in case the cups were secured by gluing either their backing would glue on to the top of the sockets, or else it had to be withdrawn before the cups had been previously secured. To avoid these difficulties is the object of the first part of my invention, which consists in providing the flanges or cups with latterly projection flanges, by means of which they are supported on the top of the socket-piece while in the sockets, so that the backing may be brought down upon them with any requisite force to secure them without danger or injuring the molds proper, and which also serve to form a space between their backing and the socket-board, so that, in gluing the backing may be held clamped to the cups for any length of time necessary to make a permanent and reliable connection." Then, after referring to another feature, not here in controversy, the patentee proceeds in describing this invention. "The cups are made singly and separate from the back-board *a*, for the reason that it is very difficult and very expensive to make them of one piece, and at the same time make the whole set or series fit accurately to the corresponding female sockets underneath, while by making them singly, I make them cheaply, and then by laying them one by one into the female sockets *d*, and while in such position, glueing or otherwise uniting the back-board *a* to them, I secure a fitting and correspondence of the two sets of sockets or cups, that is absolutely unattainable in any other manner. Not only this, but if one the cups *c* be accidently broken, I can at once, and in an inexpensive manner replace; while if the cups were in one piece and then one of the cups were to be broken, the whole series would become practically worthless. In furtherance of this object, I make each cup *c* with flanges or shoulders *e*, which gives each cup the broadest practicable base to stand on, yet leaves space between the cups for the attainment to the socket *d*, which I have spoken of. The grain of the wood of these cups runs by preference in the direction of their length, and transversely of the length of back-board *a*. When the shoulders *e* fit down upon the socket-board *d*, as shown in fig. *a*, the space between the faces of the sockets *d* and cups *c*, are circular in cross-section and fitted to give the proper cylindrical shape to the cigars. Further, flanges *e*, on the cups, enable me to make the mold properly rounded in cross-section without altering the depth of either the male or female cups, by simply making the the male cup with thinner or thicker edges, as the case may require."

In the flanges attached to each upper cup, at the bottom of the upper cup required to be separate and distinct fom the other, and the flanges required to be distinct from the backing board and attached to it in the manner described I find what I do not in any other case. There is no description in any patent of *exactly* the same thing; there is to be found in no mold which has been produced by the defendant *exactly* the same thing. In several instances there has been a *very near approach* to the alleged invention of the plaintiff, but in no instance has the mark been quite hit. It is neither claimed nor proved that any mold was ever made or used exactly as described in complainant's patent. The variations in several instances are exceedingly small, but are sufficiently marked to leave a distinction between them and the requirements and description of the complainant's invention as set forth in his patent. The case turns entirely on the complainant's flanges.

For the reasons which I give I have come to the conclusion that his invention belongs to him as inventor, and that it has the requisite novelty. So far I think his case stands on firm ground. Then comes up the question of patentability. I have no hesitation in saying that upon the argument it seemed to me that there was not sufficient novelty and merit. Single cups attached to a backing having been invented before; it seemed

to me that the point beyond this prior invention which the compainant has reached is not sufficient to sustain a patent. In this aspect of the case I thought there was no novelty. It is proved that small as these flanges are inconsequent as they seem, little bearing as they have upon the question, there is some merit, some utility.

If that be so, united with the novelty which has been found to exist, and which is established in the proof, small as that merit is, it entitled the complainant to a patent in the judgment of the commissioner of patents, in the judgment of the patent office, and it entitles him to the judgment of this court upon that point. If this be so, the patent seems to be supported and the complainant is entitled to the benefit. We have no authority to measure the degree or merit in the case in this connection.

The action of the patent office is *prima facie* proof to that effect. The testimony in the record bears upon the proof and sustains the judgment of the patent office if this were material. The testimony of Miller is full to this effect, and in my judgment it has not been effectively contradicted. The testimony of Peterson, of the complainants, is less cogent, but substantially to the same effect. The testimony of Tietig and Hientz bears somewhat in the same direction, but with less force. Now this general reflection strikes me as very material to the solution of any doubts upon the subject, and the idea has had great weight with me in coming to the conclusion which I have reached and with very considerable hesitation for the time of the correction of judgment. There can be no doubt that in the distinct conception of the patent, complainant has done what was not done before. One or two persons have suggested the proper cup can be made single and separate from the others, or connected with them, the cups being made in sections of one, two or more, and the last patent of Dubrul contains, perhaps, what may be called the flange, but that flange is inside. I examined the model and came to that conclusion. Here the flange regulates the depths and that is set out in the patent. This flange attached when properly connected regulates the depths to which it can be pressed, and that makes the peculiar mold in which lies the merit of the alleged invention. But departing from the details it may be assumed, I think, from the proof, that nobody had found, or described, or insisted on Miller's particular configuration of these models. Why should not others let the alleged inventor alone? They can use anything that preceded it—the old German mold, any of those covered by the Dubrul patents, they can use anything in relation to which evidence has been given and which anticipated the alleged invention of the complainant. Now if this was so worthless or wanting in originality, so immaterial as it is claimed, why should not they let it alone? The conclusion I have reached in sustaining the patent only requires that this should be done. It does not interfere with the use of any of these inventions, which really seem to be better than his and all which antedate his. His invention, such as it is, worth much or little, belongs to him, and under the patent he is entitled to the exclusive manufacture of it.

I am, therefore, constrained to come to the conclusion that the plaintiff is entitled to the injunction.

THE correctness of the following announcement taken from an exchange, we do not vouch for: "A suit is being commenced against the estate of James Kent, involving the title to "Kent's Commentaries." It is claims that the deceased judge was not the author of the celebrated work on jurisprudeece, the plaintiff, to support this allegation, relying on the following line in Shakspeare: "Kent, in the Commentaries Cæsar writ."—Henry VI, Part 2, Act 4. Scene 7.

CONTRACT FOR WHARFAGE A MARITIME CONTRRCT.

EX PARTE EASTON *ET AL.*

Supreme Court of the United States, October Term, 1876.

1. THE CONTRACT FOR WHARFAGE, express or implied, is a maritime contract and may be enforced in admiralty, *in rem* or *in personam*.

2. THE FUNCTIONS OF A WRIT OF PROHIBITION discussed.

Petition for a writ of prohibition.

Mr. Justice CLIFFORD delivered the opinion of the court.

Judicial power under the federal constitution extends to all cases of admiralty and maritime jurisdiction, and it was doubtless the intention of congress, by the ninth section of the judiciary act, to confer upon the district court the exclusive original cognizance of all admiralty and maritime causes, the words of the act being in terms exactly co-extensive with the power conferred by the constitution. In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject three propositions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without much discussion of the principles on which the adjudications rest: 1. That the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our constitution was adopted. 2. That the jurisdiction of those courts does not extend to all cases which would fall within such jurisdiction according to the civil law and the practice and usages of continental Europe. 3. That the nature and extent of the admiralty jurisdiction conferred by the constitution must be determined by the laws of congress and the decisions of this court, and by the usages prevailing in the courts of the states at the time the federal constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the constitution than those which were then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts.

Authority is conferred upon the libellants as the proprietors of the wharf and slip in question by the law of the state to charge and collect wharfage and dockage of vessels lying at said wharf and within the slip adjoining the wharf of the libellants.

Sufficient appears to show that the respondents are the owner of the barge named in the libel; that on the tenth of October, 1876, she completed a trip from the port of Baltimore for the port of New York, and that she took wharfage at the wharf or pier of the libellants, where she remained for eleven days. For the use of the berth occupied by the barge the libellants charged thirty-four dollars and twenty cents as wharfage and dockage. Due demand was made and payment being refused, the libellants instituted the present suit, which is a libel *in rem* against the barge to recover the amount of that charge. Process was served, and the respondents appeared and excepted to the libel, and set up that process of condemnation should not issue against the barge for the following reasons: 1. Because no maritime lien arises in the case for the matters set forth in the libel. 2. Because no lien in such a case is given for wharfage against boats or vessels by the laws of the state. 3. Because the law of the state referred to in the libel as giving a lien for wharfage is unconstitutional and void for the following reas-

ons: 1. Because it imposes a restriction on commerce. 2. Becauses it imposes a duty of tonnage on all vessels of the character and description of that of the respondents. 3. Because it discriminates against the boats or barges of persons who are not citizens of the state where the proprietors of the wharf reside.

Pending the proceedings in the district court the respondents presented a petition here, asking leave to move this court for a prohibition to the court below, forbidding the district court to proceed further in the case. Pursuant to said petition this court entered an order permitting argument upon the merits of the petition and directing that due notice be given to the libellants and the clerk of the district court. Hearing was had in conformity to that order, and the case was held under advisement.

Power is certainly vested in the supreme court to issue the writ of prohibition to the district court when that court is proceeding in a case of admiralty and maritime cognizance of which the district court has no jurisdiction. 1 Stat. at Large, 81; U. S. v. Peters, 3 Dall. 129. Where the district court is proceeding in a cause not of admiralty and maratime jurisdiction, the supreme court cannot issue the writ, nor can the writ be used except to prevent the doing of something about to be done; nor will it ever be issued for acts already completed. Ex-parte Christy, 3 How. 292; U. S. v. Hoffman, 4 Wall. 158.

Admiralty and maritime jurisdiction is conferred by the constitution, and Judge Story says it embraces two great classes of cases—one dependant upon locality, and the other upon the nature of the contract. Damage claims arising from acts and injuries done within the ebb and flow of the tide have always been considered as cognizable in the admiralty, and, since the decision in the case of the Genesee Chief, it is considered to be equally well settled that remedies for acts and injuries done on public navigable waters, not within the ebb and flow of the tide, may be enforced in the admiralty as well as for those upon the high seas and upon the coast of the sea. Speaking of the second great class of cases cognizable in the admiralty, Judge Story says, in effect, that it embraces all contracts, claims, and services which are purely maritime and which respect rights and duties appertaining to commerce and navigation. 2 Story Const., sec. 1,666. Public navigable waters, where inter-state or foreign commerce may be carried on, of course include the high seas, which comprehend, in the commercial sense, all tide waters to high-water mark.

Maritime jurisdiction of the admiralty courts, in cases of contracts, depends chiefly upon the nature of the service or engagement, and is limited to such subjects as are purely maritime and have respect to commerce and navigation within the meaning of the constitution. Wide differences of opinion have existed as to the extent of the admiralty jurisdiction; but it may now be said, without fear of contradiction, that it extends to all contracts, claims, and services essentially maritime; among which are bottomry bonds, contracts of affreightment, and contracts for the conveyance of passengers, pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the sea, the claims of material-men and others for the repair and outfit of ships belonging to foreign nations or to other states, and the wages of mariners; and also to civil marine torts and injuries, among which are assaults or other personal injuries, collision, spoliation and damage, illegal seizures or other depredations on property, illegal dispossession or withholding of possession from the owners of ships, controversies between the part owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance. Conkl. Treatise, (5th ed.) 254.

Wharf accommodation is a necessity of navigation, and such accommodations are indispensible for ships and vessels and water-craft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable ships, vessels, and all sorts of water-craft to lie in port in safety, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers. Piers or wharves are a necessary incident to every well-regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay and constant peril. Conveniences of the kind are wanted both at the port of departure and at the place of destination, and the expenses paid at both are everywhere regarded as properly chargeable as expenses of the voyage. Commercial privileges of the kind cannot be enjoyed where neither wharves nor piers exist, and it is not reasonable to suppose that such erections will be constructed for general convenience unless the proprietors are allowed to make reasonable charges for their use.

Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred. Such erections are indispensably necessary for the safety and convenience of commerce and navigation; and those who take berth alongside them to secure those objects derive great benefit from their use. All experience supports that proposition, and shows to a demonstration that the contract of the wharfinger appertains to the pursuit of commerce and navigation.

Instances may, doubtless, be referred to where wharves are erected as sites for stores and storehouses, but the great and usual object of such erections is to advance commerce and navigation by furnishing resting-places for ships, vessels, and all kinds of water-craft, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers.

Nor is the nature of the service or the character of the contract changed by the circumstance that the water-craft which derived the benefit in the case before the court was without masts or sails or other motive power of her own. Sail ships, and even steamships and vessels, are frequently propelled by tugs, and yet, if they secure a berth at a wharf, or in a slip at the place of landing, or at the port of destination, and actually occupy the berth as a resting-place, or for the purpose of loading or unloading, no one, it is supposed, will deny that the ship or vessel is just as much liable to the wharfinger as if she had been propelled by her own motive power.

Neither canal boats or barges ordinarily have sails or steam-power, but they usually have tow-lines; and it clearly cannot make any difference, as to their liability for wharfage, whether they are propelled by steam or sails of their own, or by tugs or horse or mule-power, if it appears that the boat or barge actually occupied a berth at the wharf or slip at the commencement or close of the trip as a resting-place, or for the purpose of loading or unloading cargo, or for receiving or landing passengers. Goods, to a vast amount, are transported by such means of conveyance; and all experience shows that boats of the kind require wharf privileges as well as ships and vessels, or any other

water-craft engaged in navigation. The Northern Belle, 9 Wall. 328. Access to the ship or vessel rightfully occupying a berth at a wharf, for the purpose of lading and unlading, is the undoubted right of the owner or charterer of such ship or vessel for which such right has been secured. Wendell v. Baxter, 12 Gray, 496. Privileges of the kind are essential to the carrier by water, whether he is engaged in carrying goods or passengers.

Repairs to a limited extent are sometimes made at the wharf, but contracts of the kind usually have respect to the voyage, and are made to secure a resting-place for the vessel during the time she is being loaded or unloaded. Such contracts, beyond all doubt, are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat. Carrying vessels would be of little or no value unless they could be loaded; and they are usually loaded from the wharf, except in a limited class of cases where lighters are employed, the vessel being unable to come up to the wharf in consequence of the shoalness of the water. Accommodations at the port of destination are equally indispensable for the voyage as those at the port of departure. Consignments of goods and passengers must be landed, else the carrier is not entitled to freight or fare. Where the contract is to carry from port to port, an actual delivery of the goods into possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf, but to constitute a valid delivery there, the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods or to put them under proper care and custody. Delivery on the wharf, under such circumstances, is valid if the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners. The Eddy, 5 Wall. 495.

These remarks are sufficient to show that wharves, piers, or landing places are well nigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract for which, if the vessel or water-craft is a foreign one, or belongs to the port of a state other than the one where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf.

Standard authorities, as well as reason, principle, and the necessities of commerce, support the theory that the contract for wharfage is a maritime contract, which in the case supposed gives to the proprietor of the wharf a maritime lien on the ship or vessel for his security.

From an early period wharf-owners have been allowed to exact from ships and vessels using a berth at their wharves a reasonable compensation for the use of the same; and the ship or vessel enjoying such a privilege has always been accustomed to pay to the proprietor of the wharf a reasonable compensation for the use of the berth. The Kate Tremaine, 5 Ben. R. 611. Ancient codes and treatises, such as are frequently recognized as the source from which the rules of the maritime law are drawn, usually treat such contracts as maritime contracts, for which the ship or vessel is liable. The Maggie Hammond, 9 Wall. 452; De Lovio v. Boit, 2 Gall. 472. Charges for wharfage were adjudged to be lien claims in the district court of the third circuit more than seventy years ago; and in speaking of that case, Judge Story says that it seems to him that the decision was fully supported in principle by the doctrines as well of the common law as of the civil law, and by the analogous cases of materials furnished and repairs made upon the ship. Ship New Jersey, 1 Pet. Adm. R. 228. Ex-parte Lewis, 2 Gall. 484, where it was expressly adjudged that the contract was necessarily maritime, giving as the reason for the conclusion that the use of the wharf is indispensible for the preservation of the vessel. Johnson v. McDonough, Gilpin, 103. Other eminent admiralty judges have decided in the same way, and among the number the late Judge Ware, whose opinion in cases involving the question of admiralty jurisdiction is entitled to the highest respect. The Phœbe, Ware, 361; 2 Conkl. Adm. (2d ed.) 515; Bark Alaska, 3 Ben. 392; Hobart v. Drogan, 10 Pet. 120; The Mercer, 1 Sprague, 284; the Ann Ryan, 7 Ben. R. 21; Dunlap Adm. 75; Abbott on Ship. (5th ed.) 423.

Water-craft of all kinds necessarily lie at a wharf when loading and unloading, and Mr. Benedict says that the pecuniary charge for the use of the dock or wharf is called wharfage or dockage, and that it is the subject of admiralty jurisdiction; that the master and owner of the ship and the ship herself may be proceeded against in admiralty to enforce the payment of wharfage, when the vessel lies alongside the wharf, or at a distance, and only uses the wharf temporarily for boats or cargo. Benedict Adm. (2d ed.) § 283.

Application for the writ of prohibition is properly made in such a case, upon the ground that the district court has transcended its jurisdiction in entertaining the described proceeding; and whether it has or not must depend, not upon facts stated dehors the record, but upon those stated in the record upon which the district court is called to act and by which alone it can regulate its judgment. Mere matters of defence, whether going to oust the jurisdiction of the court or to establish the want of merits in the libellant's case, cannot be admitted under such a petition here to displace the right of the district court to entertain suits, the rule being that every such matter should be propounded by suitable pleadings as a defence for the consideration of the court, and to be supported by competent proofs, provided the case is one within the jurisdiction of the district court. Ex-parte Christy, 3 How. 308.

Congress has empowered the supreme court to issue writs of prohibition to the district courts "when proceeding as courts of admiralty and maritime jurisdiction," by which it is understood that the power is limited to a proceeding in admiralty. Conkl. Treatise (5th ed.) 56. Such a writ is issued to forbid a subordinate court to proceed in a cause there depending on suggestion, that the cognizance thereof belongeth not to the court. F. N. B. 39; 3 Bl. Com. 112; 2 Pars. on Ship. 193; 8 Bac. Abr. 206.

Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel is a maratime contract, and, as such, that it is cognizable in the admiralty; that such a contract being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner.

Many other questions were discussed at the bar which will not be decided at the present time, as they are not properly involved in the application before the court.

Petition for prohibition denied.

NOTE.—This is the first case in the Supreme Court deciding that a wharfage contract, express or implied, is a maritime contract.

This number of the JOURNAL has been detained on account of "Thanksgiving"—the printers enjoying a holiday on that day.

BOOK NOTICE.

A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW, in the order of a Code. By WILLIAM A. HUNTER, M. A. William Maxwell & Son, London, 1876.

This treatise certainly supplies a *desideratum* to the student of Roman law. In this edition it is presented in excellent form, with good type and upon strong, clear paper, with very few typographical errors.

The author tells us in the *preface*, that "the object of this work is to place before the English reader, in the form of a Code, the most original and not the least valuable portion of Latin literature." * * *

"Through the writings of Sir Henry S. Maine, the importance of considering law in its historical aspect has been deeply impressed upon English students. In tracing the development of legal conceptions, the Roman law, owing to the remarkable continuity of its history, possesses a singular value. In this treatise, accordingly, are set forth the chief steps in the progress of the civil law from the time of the Twelve Tables to the end of Justinian's reign—a period of nearly a thousand years. "For the convenience of students a translation of the Institutes of Justinian, and (where any difference exists) of the Institutes of Gaius is embodied in the text as part of the exposition. The passages taken from Gaius and Justinian are distinguished by a difference in type."

The work is a systematic and able production, to the execution of which in its present shape the author undoubtedly brought to bear great patience and industry and extensive learning. More copious than Maine's "Ancient Law," in its references and quotations, it is in some respects to be taken as suppletory thereto, while in many other respects it is fitted to supersede that work as a text book.

To a great extent Mr. Hunter's book dispenses with the necessity of the present text books of Justinian and Gaius, which now form part of the *curriculum* of our law schools. Indeed, upon a careful consideration, we might well replace the latter altogether by the former. Within its 900 pages and over, is contained an admirable exposition of Roman law, with excellent comments and valuable references. Its criticisms recommend themselves for acumen and clearness.

The method of the work is perhaps not the most satisfactory, being partly open to the objection made against Bentham, viz.: too much dividing and subdividing. Mr. H. endeavors to support his method of arrangement in his *introduction* by a plausible argument. Nevertheless, one cannot but think his work would have gained in clearness, and would have been more satisfactory if he had, in this particular, shown less of Bentham, and adopted a less complex arrangement.

It bears, in some respects, the same comparison to the productions of certain German writers on the same subject, that Liebig's Chemistry does to Schlegel's. The first is built on research or experiment, the latter on theoretical deduction and reasoning. Both are valuable for some purposes, but the first is the most valuable and indispensable. The book in question is one for the lawyer who aspires to more than mere money making, and should early find a place in the libraries and among the text books of our law schools.

M. M. C.

THE consolidation scheme for uniting the interests of the Western Union and the Atlantic and Pacific Telegraph comdanies has met an obstacle in a clause in the Constitution of Pennsylvania, which provides that "no telegraph company shall consolidate with or hold a controling interest in the stock or bonds of any other telegraph company owning a competing line, or acquire by purchase or otherwise any other competing line or telegraph."

CORRESPONDENCE.

THE INDIANA PROBATE SYSTEM.

To the Editor of the Central Law Journal:

An article written by "R. W. B." entitled "Some Needed Reforms in the Indiana Probate System," and appearing in No. 15 of the CENTRAL LAW JOURNAL, has attracted some attention among the profession in this part of the state, and I beg the privilege of expressing what I believe to be the popular sentiment among lawyers here, as to the questions of which R. W. B. speaks. He declares in favor of probate courts, fixed salaries for clerks and sheriffs, and "the one term rule." Some reform may be needed in our probate system, but will the establishment of probate courts effect such a reform? The question has been much discussed in this state, and at the last session of our legislature a bill was introduced creating probate courts. But, after proper consideration, I am informed that a large majority of both houses were adverse to the bill. The expense connected with such a measure may have had some influence in creating enemies for the bill, but other considerations were also against it. What benefit could result? Probate judges would, of course, be elected as clerks are, and in a very large majority of cases would be chosen from a class having no legal attainments; for no lawyer of ability could be induced to abandon a thriving business and accept an office which would drive him from the practice. I maintain that we could not get any better men to accept a probate judgeship than we can a clerkship. If bad men are sometimes "foisted into office" as clerks, might they not quite as frequently be thus "foisted into office" as probate judges? My point is this. Inasmuch as we could not secure better men for our probate judges than for our clerks, what great good could be accomplished in elevating the standard of official ability and integrity by the establishment of these new courts? Bad or incompetent men, clothed with *judicial* powers, are certainly in positions to do more harm than if clothed with *ministerial* powers only. Attorneys, more than any other class of citizens, are leaders in politics and educators of the public mind, and I believe R. W. B. has struck the key note of the needed reform, when he says that concerted action should be had by attorneys, without regard to politics, in securing better officials.

When lawyers lend their influence and votes to men of competency and integrity, throwing aside political prejudices, in the selection of our clerks, then will the needed reform in some degree be effected. I also believe that the law ought to be changed. But I suggest that, rather than establish a new court, let the law be so changed as to require all probate business to be done by the clerk, making his actions final, except in cases where judicial functions must necessarily be exercised in the trial of causes, or determination of legal points raised by adverse interests, when he should be required to certify the cause to the circuit court for trial as other causes. This would accomplish all that could be done by the erection of probate courts, save that unnecessary expense, and result in the selection of better men for clerks, and the trial of all litigated probate business by a *competent tribunal*. As the law now is, a clerk is powerless, in regard to the general probate business, and no matter how well disposed he may be, his hands are tied. But place the whole matter in his hands, making the law specific, and his duties all ministerial, and his bondsmen liable for his acts in the premises, and he is not only protected in the discharge of his duty, in requiring prompt settlements and proper management of estates, but is *positively bound to do it.*

Concerning the question of fees or salaries of clerks, I am not so much interested, except that I believe they ought to be reasonably paid for their arduous and responsible labors. This can in no way so satisfactorily or equitably be done as by allowing them a fixed price for each item of labor performed—thus paying them for what they actually do, rather than what they might or ought to do. There are a thousand things connected with the proper management of a clerk's office, which the average attorney has no correct conception of. And if paid for all he does, and for nothing else, that will be an additional incentive to him to look after all the details accurately. It requires great executive ability, and much skill and experience, for one to be able satisfactorily and properly to discharge all the duties of the clerk's office. Large interests often depend upon the proper wording of a judgment or decree, which the attorneys can not, in the hurry of business, oversee and ought not in any case to be required to dictate. No one can fully know, except by actual experience, the great variety and amount of labor required to be performed by our clerks of the circuit court, and they should be well paid in view of all this.

And in consequence of the skill and experience necessary for the proper discharge of his duties, I do not hesitate to say, what I believe to be the almost universal opinion of well informed lawyers throughout our state, that a good, efficient clerk ought not to be limited to so short a service as four years. And if he is incompetent, there is no danger but the people, if properly enlightened by those who are in constant business contact with him, will regulate and limit his official career. Judge Buskirk, in his valuable work on Practice, page 82, says, "As very few of the clerks are learned in the law, and as they are required by our constitution to retire from office about the time they have become familiar with their duties, many defective transcripts are filed in the supreme court." And he only reiterates what the supreme court itself has said in several of the decided cases. As our present constitutional provision only limits the consecutive service of clerks to eight years, it is plain that the authorities referred to do not favor a reduction to four years.

I have no defense to make for incompetent officials but I believe that a thoroughly competent clerk should not be displaced, just when he is best able to accomplish the greatest good, both to lawyers and litigants. And I also believe that the remedy for incompetency in that office lies almost exclusively with the profession, if they will but exercise their influence in a proper direction and in concert.

We are not careful enough in selecting our clerks. Men of known integrity and competency should be selected by the attorneys, to whom they should give their united influence; and such a recommendation, coming from such a source, would certainly result in his choice by the people.

Then clothe him with full power to do all ministerial acts necessary to be done in the general management and control of probate proceedings, and I believe the "needed reforms in the Indiana probate system" will be accomplished.

FT. WAYNE, Oct. 20, 1877. L. W. B.

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

PROOF OF RESIDENCE--1. In order to effect a change of residence there must exist both the intention to change and the fact of removal. Neither is sufficient alone. Ballenger v. Lantier, 15 Kansas, 608. Reversed. Opinion by BREWER, J.; all the justices concurring. —*Adams v. Evans.*

PRACTICE.—1 An answer which merely puts in issue allegations of the petition does not need a reply. 2 Where a case is tried by both parties, as though all the allegations of the answer were in issue, it must be deemed, under such circumstances, that a reply was waived, even if, under other circumstances, a reply should be considered as necessary. Opinion by VALENTINE, J. All the justices concuring. Affirmed. *Netcott v. Porter.*

INTEREST—CONSTRUCTION OF A NOTE AND MORTGAGE.—1. Where a note is given payable in four years, with interest at ten per cent., and at the same time a mortgage is given to secure the payment of the note, in which mortgage it is stipulated that the interest is payable annually and the interest to become principal, if not paid when due, and if default be made in said payment, or any part thereof, as provided, then this conveyance shall become absolute. *Held*, that the interest is to be construed as payable each year, and that on default of the payment of interest, the mortgage may be foreclosed for the amount due. Reversed. Opinion by HORTON, C. J.; all the justices concurring. —*Meyer v. Graber.*

ACCOUNTS FOR THE RELIEF OF THE POOR.—1 Under section 24, general statutes, 626, of the act for the relief of the poor, a physician and surgeon, who furnishes medical and surgical attendance to a person in distress, and not an inhabitant of the township in which he is found lying sick, without friends or money, under the direction and employment of an overseer of the poor of such township, is entitled to reasonable compensation for his services, and if the board of county commissioners of the county in which such employment occurs, refuse to allow a claim therefor properly made out and presented, or disallow such claim in part, the claimant may take the same to the district court on appeal, and there recover what the services are reasonably worth. Opinion by HORTON, C. J. All the justices concuring. Affirmed. *Commissioners of Pottawatomie county v. Morral.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON,
" JOHN W. HENRY,

CRIMINAL LAW—INDICTMENT.—An indictment under sec. 29, 449 Wag. St., which fails to allege that the offence was done "on purpose and of malice aforethought," is bad; and a judgment of conviction thereon will be reversed. State v. Comfort, 5 Mo. 357. Opinion by HENRY, J.—*State v. Epps.*

CRIMINAL LAW—ADMISSIONS OF DEFENDANT.—It is clearly error in a trial court to instruct the jury that declarations made by defendant voluntarily are evidence against him, but are not evidence in his favor. All of the statement must go to the jury, and the jury are the judges of the weight of evidence. Opinion by HENRY, J.—*State v. Napier.*

CRIMINAL LAW—INDICTMENT.—A verbose, prolix indictment which talks all around the crime intended to be charged, but does not contain any direct averment of matters necessary to be stated in order to constitute a crime, is bad, and a judgment of conviction thereon will be reversed in the supreme court. Per CURIAM.—*State v. Smith.*

CRIMINAL LAW—PRACTICE—A trial court properly refuses an instruction in criminal cases, when the same law has already been given in other instructions. The granting of a new trial on affidavit of newly discovered evidence is a matter of discretion with the trial court. Where the affidavit shows that the object of the newly discovered evidence is to impeach a witness for the prosecution, and not to establish facts tending directly to the defense of the accused, the motion is properly overruled. Opinion by HENRY, J.—*The State v. Smith.*

CRIMINAL LAW—AUTRE FOIS ACQUIT.—Under the statute, sec. 31, p. 1091, 2d Wagner, upon an indictment charging the larceny of "money made and issued under the laws of the United States," proof is admissible to show the specific character of the money—whether gold, silver, notes, etc.—and when only one larceny is charged, and the defendant was acquitted, *autre fois acquit* is a good plea in bar to a second indictment for the same act of taking. Opinion by HENRY, J.—*State v Chas. P. Moore.*

PRINCIPAL AND SURETY—SURETY DISCHARGED BY EXTENSION OF CREDIT.—When time is given by a valid agreement which ties up the hands of the creditor as to the principal debtor, although only for a single day, the surety is discharged. Where the creditor took new notes for the debt, received the interest in advance, and made entry in his own books that the new note was a conditional payment of the prior debt, and this giving of renewal notes, etc., was repeated several times, the surety is dischargod. Opinion by HENRY, J.—*First Nat. Bank of Springfield v. Levill et al.*

CRIMINAL LAW—PRACTICE.—Where the sheriff was permitted, against the objection of defendant, to testify that when he "took charge of the jail in 1876, the defendant was then in jail on a charge of petit larceny," and there is nothing in the record to show whether the testimony referred to the charge then tried, or to some other offense, the admission of such testimony was error, for which this court will reverse the judgment of conviction. The rule of civil practice, that the supreme court will not consider *general* objections to evidence, but only such as are specific, does not apply in criminal cases. Opinion by HENRY, J.—*State v. O'Connor.*

CRIMINAL LAW—PRACTICE—ONUS PROBANDI.—In criminal cases, the burden of proof is never shifted from the state to the defendant. The assertion of the state is that defendant is guilty, and the defendant's plea is that he is not guilty; and it devolves upon the state, throughout the trial, to prove that upon the whole evidence in the case, the defendant is guilty beyond a reasonable doubt, and it is error to charge that upon the case made by the state the jury will convict, unless the defendant prove to their reasonable satisfaction, some matters of defense, especially where the usual instruction giving the defendant the benefit of a reasonable doubt was not given. Opinion by HENRY, J.—*State v. Wingo.*

CRIMINAL LAW—THREATS—MISCONDUCT OF JUDGE.—Threats made by deceased against defendant are not admissable in evidence, except as they tend to prove an alleged assaulton the part of deceased against the defendant. It is misconduct on the part of a circuit judge, for which this court will reverse a judgment of conviction, if the judge holds private communications, either written or verbal, withthe jury while their verdict is under consideration, either as to the instructions given them, or as to how the jury stand upon the case. There ought to be no communication between the judge and jury, except in open court and in the presence of counsel. Opinion by HENRY, J.—*State v. Alexander.*

CRIMINAL LAW—MISCONDUCT OF THE JUDGE—BILL OF EXCEPTIONS.—Where the judge, after the retirement of the jury, in the absence of counsel, all other persons being excluded from the court-room, recalled the jury and gave them additional instructions, this was error for which the judgment must be reversed. Where a judge refused to sign a bill of exceptions on the ground that it was untrue, but the record contains a clear statement that it and the affidavits of bystanders were *filed*, it will be treated as signed and filed. This court might presume that the judge's certificate of the untruth of the bill of exceptions was intended as a refusal to permit the same to be filed, if it were not for the clear and explicit statement of the record that it was filed. Opinion by HENRY, J.—*Norton v. Dorsey.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1871.

HON. SAMUEL E. PERKINS, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
} Associate Justices.

CONTRACT—PERFORMANCE—PLEADING.—When an agreement, the terms of which are mutually inter-dependent, is relied on, either as cause of action or as matter of defense, the party pleading the same must aver the performance, or a sufficient excuse for the non-performance of the stipulations on his part to be performed, or the pleading will be insufficient on demurrer, for the want of sufficient facts. Opinion by HOWK, J.—*Milton v. Coffelt.*

FORGERY—INITIALS IN INDICTMENT.—Where an indictment for forgery was predicated on a note signed "S. B. Skinner," and the intent laid was "to defraud one Solomon B. Skinner;" *Held*, that a motion in arrest of judgment should have been sustained. It could not be inferred, either as matter of fact or of law, that Solomon B. Skinner was meant or intended by the name S. B. Skinner. The fact should have been positively averred in the indictment. Opinion by HOWK, J.—*Shinn v. The State.*

EQUITABLE RIGHTS OF MARRIED WOMEN—PLEADING—PRACTICE.—A married woman may, with the consent of her husband, make an equitable transfer of a note and mortgage by sale and delivery to the purchaser. 2. A demurrer to a complaint, for want of sufficient prayer, will be overruled if, on the facts stated, the plaintiff is entitled to any relief whatever, although not that demanded. 3. A defect in the prayer for relief is not a ground of demurrer, but for a motion to make more specific. 45 Ind. 355. Opinion by PERKINS, C. J.—*Baker et al v. Armstrong.*

HEARSAY EVIDENCE.—Prosecution for keeping a faro bank. During the trial a witness for the state testified as follows, over the objection of the defendant: "I have understood from others that the defendant and Wilson were the owners of the faro bank; I do not know who owned it except by hearsay." *Held*, this evidence was improperly admitted. Even if the witness had derived his understanding "from others" in the room where the faro bank was kept, it would not have been competent evidence, unless the facts upon which the witness founded his understanding were stated and brought home to the knowledge of the defendant. The witness could only testify as to the facts, leaving the jury to ascertain the understanding therefrom. Opinion by BIDDLE, J.—*Schooler v. The State.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

PROMISSORY NOTE NOT PAYMENT.—1. It is the settled law of this state that, in the absence of an express agreement on the subject, the taking of a promissory note for either a precedent liability or one incurred at the time, does not operate as a payment. 2. Suit upon one of several promissory notes, given for the contract price of machinery, where defendants claimed damages for imperfections in machinery, the notes not appearing to have been received as payment, and a part of them not being due or paid. *Held:* That if defendant's damages were greater than the amount of the note in suit, they could not have a judgment in this action for the excess. Opinion by COLE, J.—*Aultman & Co. v. Jett et al.*

EVIDENCE—CONSTRUCTION OF STATUTE.—Sec. 7, ch. 112 of 1856, provides that "copies of the lists of lands required by section 5 of this act to be filed in the offices of the secretary of state and the registers of deeds of the several counties shall, when certified to be correct by said officers respectively, under their official seals, be received in any court of this state as evidence" of certain facts. *Held:* That in the certificate accompanying such copy, the certifying officer must state that "it has been compared *by him* with the original," as required by the general provision of sec. 71, ch. 137, R. S., and a mere certificate that such copy "has been compared" with the original, and is correct, is insufficient. Opinion by RYAN, C. J.—*Stevens v. Clark County.*

REAL ESTATE—MEANING OF "GRANT"—PRESUMPTION IN CONVEYANCE TO MARRIED WOMAN—GENERAL REFUSAL OF INSTRUCTIONS.—1. In a statute which declares "that a married woman may receive by inheritance, or by gift, *grant*, devise or bequest, from any person other than her husband, and hold to her sole and separate use" real and personal property, (R. S., ch. 95, sec. 3), the word *grant* includes deeds of bargain and sale of land. 2. Where a conveyance is made by a stranger to a married woman, the presumption in the absence of proof is that the consideration was paid by her, and not by her husband. 3. A general refusal of all the instructions asked by a party is equivalent to a specific refusal of each instruction, allowing the party praying therefor the full benefit of any specific exception; and the general form of the refusal is not error. Opinion by LYON, J.—*McVey v. G. B. & Minn. R. R. Co.*

REPLEVIN—JURISDICTION OF JUSTICE—APPEAL.—1 If the affidavit upon which a writ of replevin issues from a justice's court fails to state the value of the property, or states it over $200, the justice takes no jurisdiction, whatever the value may be in fact, and the proceeding is *coram non judice*. 2. If the affidavit states the value under $200, the justice has jurisdiction to issue the writ and try the action. 3. If, however, in such a case, the justice's judgment, which must always determine the value, determines it to be over $200, he has no further jurisdiction, (whatever the value may be in fact), except to render the statutory judgment of abatement, R. S., ch. 120, sec. 145, including costs in defendant't favor, and damage for the caption and detention of the property seized by the officers. 4. An appeal lies from such a judgment; and on such appeal the circuit court tries *de novo* the question of value, as it does other issues, and determines it for all purposes, including the question of the justice's jurisdiction. 5. Barker v. Baxter, 1 Pin. 407; Dewey v. Hyde, 1 id. 469; Felt v. Felt, 19 Wis. 193; Stringham v. Supervisors, 24 id. 504; Klaise v. The State, 27 id. 462; Nimmick v. Mathiesson, 32 id. 324; and Cooban v. Bryant, 36 id. 606, distinguished from this case. 6. Where the charge of the court is correct in itself, and the bill of exceptions is not certified to contain all the evidence, it will be presumed that there was evidence to support the charge. Opinion by RYAN, C. J.—*Darling v. Conklin.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

CRIMINAL LAW—LIQUOR LAW—EVIDENCE.—Upon the trial of a complaint for keeping liquor with intent to sell, there was evidence to the effect that the defendant kept a place of business consisting of two rooms, in one of which was a counter, and a few cigars, with tables and chairs; that the place was one of common resort; that, on being arrested at that place he tried to conceal a bottle containing intoxicating liquor in his pocket, and afterwards, and while under arrest, he made an attempt to bribe the officer who arrested him. *Held:* That the evidence admitted was all of it competent and material, and sufficient to justify a verdict against the defendant. Opinion by AMES, J.—*Com. v. James Wallace.*

SAME.—Upon the trial of a complaint for keeping intoxicating liquor for sale, there was evidence to the effect that the defendant kept a public bar, provided with tumblers and a dripping pan; that this bar was resorted to at all hours during the day and evening, and at times, at very late hours of the night; and that upon searching the defendant's person, at the time of his arrest at his place of business, three bottles containing intoxicating liquors were found in his pockets. *Held:* That all this evidence was competent, and would authorize the jury to convict. Opinion by AMES, J.—*Com. v. William Wallace.*

TRUSTEE PROCESS.—ADVERSE CLAIMANT.—EVIDENCE.—In the trustee process, an adverse claimant is admitted as a party to the suit, solely for the purpose of maintaining his right as against the plaintiff, to goods, effects or credits in the hands of the supposed trustee, and not for the purpose of trying, as against the defendant or the trustee, the right to funds to which the plaintiff does not or cannot assert any title. Gen. Sts. C. 142, § 15; St. 1865, C. 43; Boyden v. Young, 6 Allen, C. 582; Peck v. Stratton, 118 Mass. 406. 2. When, therefore, as between plaintiff and claimant, the claim has

DE FACTO JUDGE.—Where the plea in a criminal case set up the incompetency of the magistate, before whom the prosecution was commenced, upon the ground that, holding the executive office of mayor of a city, he could not at the same time exercise judicial powers as a judge within the same territory, it was *held*, that, as upon the allegations of the plea, he was, at least, a judge *de facto*, his jurisdiction could not be controverted upon this ground, nor the question whether the two offices were incompatible be tried in a proceeding to which he was not a party. Milward v. Thacher, 2 T. R. 81, 87; McGregor v. Balch, 14 Vt., 428; Coolidge v. Bringham, 1 Allen, 133; Sheehan's case, 122 Mass. C. L. J. vol. IV. 524. Opinion by GRAY, C. J.—*Com. v. Taber.*

been allowed in the lower court, upon the trial of that question on appeal, evidence that there were no goods, effects or credits of the defendant, in the hands of the trustee, at the time of the service of the writ upon him, is unadmissible, as it would, in effect, prove the claimant out of court. Opinion by GRAY, C. J.—*Clark v. Gardner.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MICHIGAN.

October Term, 1877.

NON. T. M. COLLEY, Chief Justice.
" J. V. CAMPBELL, }
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }

RAILROAD PASSENGERS—EJECTMENT FROM TRAIN—CONDUCTORS TO BE GOVERNED BY TICKET THOUGH INCORRECT — FORM OF DECLARATION. — Plaintiff brought trespass on the case against the company for damages for being put off a train of cars by its conductor. He had purchased a ticket at the ticket office, accepting without inspection one which, through the ticket agent's mistake, covered a shorter distance than had been bargained and paid for, and the conductor put him off at the end of the shorter distance. *Held*, that, as between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon as the evidence of his right to his seat. Where a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or, if the company, through its agent's mistake has given him the wrong ticket, so that he has been compelled to relinquish his seat or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but the declaration would have to differ essentially from that here adopted. Judgment for defendent affirmed. Townsend v. N. Y. C. & H. R. R. Co., 56 N. Y. 228; Hibbard v. N. Y. & E. R. R., 15 N. Y. 470; Bennet v. N. Y. C. & H. R. R., 5 Hume. 600; Downs v. N. Y. & N. H. R. R. 36 Conn. 287; C. B. & Q. R. R. v. Griffin, 68 Ill. 499; Pullman P. C. Co., v. Reed, 75 Ill. 125; Shelton v. Lake Shore & R. Co., 29 Ohio Stat. Opinion by MARSTON, J.—*Frederick v. Marquette, Houghton a nd Ontonagon R. R. Co.*

ONE WHO TAKES LAND TO SHARE THE CROP CANNOT BRING TRESPASS AGAINST CO-TENANT OR OWNER.—H. took land on shares under a verbal contract with the owner, W. to furnish half the seed, do all the work, and have half the crop. Sheep belonging to W. strayed upon the premises and destroyed a part of the growing wheat. H. sued W. in trespass *quare clausum*, alleging the field as in his possession, and averring the wheat to be his property. *Held*, that under this arrangement for raising a single crop, the possession was either that of W. alone, or of the two as tenants in common. Bradish v. Schenck, 8 J. R. 151; Walker v. Fitts, 24 Pick, 191; Caswell v. Districh, 15 Wend. 379. The injury was neither an ouster nor a destruction of the entirety, but damage to a small portion of the whole crop. A co-tenant cannot bring trespass against another for any such partial damage to the common property. Opinion by CAMPBELL, J.—*Wells v. Hollenbeck.*

NOTES.

THE English Court of Appeal has affirmed the decision of the Common Pleas Division in the case of Dickson v. Reuter's Telegram Company, 25 W. R. 272, 4 Cent. L. J. 435. The effect is to establish it as the law of England, that a telegraph company is not bound, as between itself and the recipient of a message, to use any degree of care whatever.

WE have just received the prospectus of a new venture in legal journalism, to be called *The Alabama Law Journal*, to be issued monthly, by A. B. McEachim, editor and proprietor, Tuscaloosa. Mr. McEachim promises "all the head-notes and leading and novel decisions" of the Alabama Courts, "syllabi of the recent cases decided, both north and south," of interest to the bar in Alabama, and that "each number will contain an exhaustive original article on some interesting legal topic, as well as much important legal matter extracted from the leading law magazines of the day. Legal ethics and biographical sketches of representative jurists, will be prominent features of the magazine." We have no doubt that Mr. McEachim will go far and expend a good deal of money, in an honest attempt to keep this promise; but he can not do it without expending at least four times as much money as he will receive.

IN the recent case of Taylor v. St. Helens (Eng. Ct. of App. June 19), Sir G. Jessel, Master of the Rolls, attacked an ancient maxim with a dilemma which he intended should demolish it. After saying that the true rule of construction is to construe the language of the instrument according to its ordinary meaning, giving to technical terms their technical meaning, unless you find a context which controls that construction, and that of course that context must be such as to convince the mind that the ordinary rules of construction which would be applied to the original expressions, standing alone, ought not to be applied, he adds: "I will take the liberty of making an observation as regards a maxim quoted by Mr, Christie (counsel in the cause), and which is to be found, I believe, in a great many text books, and I am afraid, also, in a great many judgments of ancient date, and that is that a grant, it there is any difficulty or obscurity as to its meaning, is to be read most strongly against the grantor. I do not see how, according to the rules of construction, as now settled by the House of Lords, that maxim has any particular or special application at the present day. The rule is to find out the meaning of the instrument, using the ordinary and proper rules of construction. If you find out its meaning you do not want the maxim, because you have already done so without any such maxim. If, on the other hand, you can not do so, then the intrument is void for uncertainty, and in that way you certainly construe it in favor of the grantor because you annul the grant. Beyond that appears to me that it is impossible that the maxim can have any practical application."

WE ARE daily receiving additions to our knowledge of General Grant, who in Paris is just as great a lion as he was in London. It is now discovered that not only is he of the Clan Grant, but that he presents a remarkable resemblance to one of the greatest of judges, Sir William Grant, a Master of the Rolls, whose fame was so great that Lord Brougham included the great master of judicial eloquence in his last work, the "Sketches of British Statesmen." Sir William Grant was born in Morayshire in 1755, and only died in 1832. Left an orphan, he was brought up by an uncle, a London merchant, and after being educated at Elgin, "the chief town of the Clan Grant," and at Leyden, he entered Lincoln's Inn and was called to the bar. He emigrated to Canada, where he was Attorney General, but returned to London, and, having attracted the notice of Mr. Pitt, he was returned for Shaftesbury. He distinguished himself in Parliament, and by an able argument in a Scotch appeal he gained the friendship of Lord Thurlow. He passed rapidly into practice and into legal promotion, and in 1801, being Solicitor General, he was appointed Master of the Rolls, the greatest of Masters, and for seventeen years was regarded as "a perfect model of judicial excellence." He had the art of brevity, an art now forgotten in the practice of law, and could dispose of an entire argument in a parenthesis. On his retirement he was requested to sit for his portrait, which is now hung up in the court he so long adorned. If the resemblance of General Grant to his great namesake should have the effect of drawing attention to the judicial merits of Sir William Grant, who never wasted a word, we shall be grateful. Perhaps General Grant has derived his own love of brevity from the most distinguished member of his clan. There is a resemblance between the Grant presented by the brush of Sir Thomas Lawrence and the Grant of our day. No matter how we get it, if we can obtain the judicial brevity of the Master and the hatred of verbosity of the General in our public life.—*London Echo.*